Supreme Court, U.S.
FILED
SEP 14 1993
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93-412

No. 93-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

DAVID M. DALE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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September 14, 1993

Questions Presented for Review

A. Fourth Amendment Issues

1. Can a search warrant otherwise violating the Fourth Amendment's particularity requirement be cured by reference to a probable cause affidavit that neither accompanied the warrant nor was found to be present at or used in the search, merely because the officer executing the affidavit was present at the search?

2. Where a search warrant issues on false allegations of product substitution under a contract with the U.S. Army, does an uncontested defense showing that any effort by the investigator to verify the allegations with U.S. Army officials would have revealed their falsity fail as a matter of law to make a "substantial preliminary showing" of reckless disregard for truth requiring an evidentiary hearing under this Court's decision in *Franks v. Delaware*, 438 U.S. 154 (1978)?

B. Federal Rules of Evidence Issues

3. What is the preliminary standard of reliability for the admission of tape-recorded evidence under the Federal Rules of Evidence?

4. Does a district court's failure to make a preliminary finding on either the reliability or the authenticity of tape-recorded evidence comply with the requirements of Fed. R. Evid. 104?

C. Federal Criminal Law and Fifth Amendment Issues

5. Can a defendant be charged and convicted for an alleged tax evasion conspiracy under either the "defraud" clause or the "offense" clause of 18 U.S.C. §371, where the charged conspiratorial conduct: (a) produced no tax revenue loss to the United States, through the defendant's own self-correction prior to the indictment; (b) consisted entirely of conduct covered by 26 U.S.C. §7201 and its lesser included offenses; or (c) included

conduct that neither was nor could lawfully be charged as constituting an attempt to evade under 26 U.S.C. §7201 or its lesser included offenses?

6. Can a defendant be charged and convicted cumulatively of offenses under 18 U.S.C. §§371, 1001, and 1343, and under 26 U.S.C. §§7201 and 7206, when all of the offenses arise from the same course of conduct that is charged exclusively as intended to evade income taxes?

7. In instructing the jury, does a district court correctly (a) omit definitions of "defraud the United States" or specific intent to defraud in charging on the "defraud" clause of 18 U.S.C. §371, (b) refuse to define "deductible expense" in a tax evasion case challenging deductibility, and (c) refuse to instruct that truth is a defense under 18 U.S.C. §1001?

8. Does a jury instruction defining reasonable doubt as "a doubt for which you can give a reason" and "such a doubt as would cause a juror . . . to be so undecided that he cannot say that he has an abiding conviction of the defendant's guilt" comply with the Due Process Clause as construed by this Court?

D. Sentencing Issues

9. Is a district court free to ignore Sentencing Commission commentary to USSG §1B1.2 requiring a finding of a defendant's participation in each object of a multi-object conspiracy beyond a reasonable doubt as a prerequisite to the application of the conspiracy sentencing guidelines?

10. Is the application of the "straddle" theory to impose a guideline sentence to a conspiracy count allegedly "continuing" beyond the effective date of the guidelines consistent with the Due Process, Double Jeopardy, and Ex Post Facto clauses of the Constitution where the result is to impose both pre-guidelines and post-guidelines sentences for exactly the same pre-guidelines offense conduct?

List of Parties

The proceeding below was a federal criminal prosecution, with the United States as plaintiff in the district court and appellee in the court of appeals, and the following parties as defendants in the district court and appellants in the court of appeals:

(1) David M. Dale, the Petitioner in this Court;

(2) Michelle Ashton;

(3) Martin Segal;

(4) Automated Data Management, Inc.; and

(5) Terence Sweeney.

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DAVID M. DALE,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner David M. Dale respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Opinions Below

The opinion of the court of appeals upon the rendering of its judgment (a1-70)[1] is reported at 991 F.2d 819 (D.C. Cir. 1993). An earlier order of the court of appeals (a71-73), remanding the case for a clarification of certain of the rulings by the district court, and the district court's responsive memorandum order (a74-75) transmitting two previously unfiled memoranda (a76-102), are unreported. The district court's opinion on defendants' motions to dismiss counts of the indictment (a103-25) is reported at 782 F. Supp. 615 (D.D.C. 1991). The remaining orders and memoranda of the district court (a126-60) are unreported.

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[1] Citations to "a-" are to pages of the appendix to this petition. Citations to "JA-" are to pages of the Joint Appendix in the court of appeals.

Jurisdiction

The judgment of the court of appeals was entered on April 6, 1993 (a1). An order denying rehearing was entered on June 16, 1993 (a161). This Court has jurisdiction under 28 U.S.C. § 1254(1).

Constitutional, Statutory, and Regulatory Provisions Involved

The pertinent texts of the Ex Post Facto Clause (art.I, §9, cl.3), the Fourth and Fifth Amendments to the Constitution, 18 U.S.C. §§371, 1001, & 1343, 26 U.S.C. §§7201, 7203, & 7206, Rules 104 and 901 of the Federal Rules of Evidence, and USSG §§ 1B1.2, 1B1.3, 2T1.1, 2T1.9, 2X1.1 & the official commentary thereto, are set forth in the appendix to this Petition (a162-73).

Statement of the Case

This case involves the destruction of a minority-owned defense contracting firm, through the collaboration of dishonest former employees of the firm and overzealous enforcement agents of the federal government.

Under this strange collaboration, an investigation launched on baseless allegations of government contract fraud, and badly motivated attacks on the bona fides of the firm as a minority enterprise, ultimately evolved into a criminal prosecution for purely imaginary income tax "evasion." As a result, the firm and its owners now stand convicted, and its owners sentenced to substantial prison terms, for "evading" income taxes that in fact were paid--voluntarily and without any deficiency assessment by the Internal Revenue Service--months and in most cases years prior to the issuance of the government's indictment, while the dishonest employees remain free to pursue further activities, apparently with the prosecutor's blessings.[2] There is something fundamentally

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[2] We stress here at the outset that no part of this Petition rests upon factual error in the courts below, or even ordinary legal error, but is confining to the issues of general importance that are presented on this record. In the following statement of the case, except where otherwise noted, we have attempted to state the case consistently with the court of appeals' recitation of the government's version

wrong with a legal structure that produces this result in even one case, much less as a durable pattern of law enforcement expediency.

In terms of the discretionary jurisdiction of this Court on certiorari, the strange evolution of this case is important to a consideration of the unusually wide range of questions now presented that are worthy of this Court's attention, for the government here has overreached the boundaries of legality in law enforcement in several different directions simultaneously.

First, the government's misguided investigatory methods raise two important and recurring issues under the Fourth Amendment: one has produced a direct and substantial conflict among the courts of appeals on the question whether the mere presence of an *affiant*--not a supporting affidavit--will serve to excuse an unconstitutionally general search warrant; the other concerns the application of this Court's guidelines for controlling the issuance of search warrants based on false accusations.

Second, the government's use at trial of tape recordings of questionable veracity exploited a chaotic state of the law in the courts of appeals on the broadly important question of the threshold requirements of reliability for tape-recorded evidence, which ought to be settled by this Court.

Third, the government's expansive use of the general federal conspiracy statute both to criminalize conduct that has not been prohibited expressly by Congress, and to impose multiple or increased punishment for a single act--which have become routine practices in the federal courts today--raises even broader and more important questions of legality in government. In particular, this Petition questions whether 18 U.S.C. §371, as construed by most though not all of the lower courts in recent years, has become a monstrosity of overcriminalization that not only threatens the freedoms of individuals in our society, but also, as applied here in the context of alleged income tax evasion, actually undermines the

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of the facts (a1-31), which views the evidence "in the light most favorable to the government"(a1), even though some aspects of the government's case where so exceedingly implausible as to defy credulity in any light (see, e.g., a10-11 & n.14 (Bowers' explanation of his admitted theft of funds from the company)).

efficacy of the tax collection system through the premature intervention of the criminal sanction.

This expansion of the general conspiracy statute into the field of tax offenses has emanated from lower court opinions, and, so far as we are aware, has not been approved by this Court. Therefore, it also presents important questions of federal law which have not been, but should be, settled by this Court.

Background Facts: The Company and its Business

This case focuses on the operations of Automated Data Management, Inc. ("ADM"), a District of Columbia corporation that was founded in 1982 by Michelle Ashton, one of the five defendants in the proceedings below. In late 1984, Ashton hired David Dale, another defendant below and the Petitioner in this Court, as executive vice-president of ADM. In addition to his salary, Dale obtained an 18% equity interest in ADM, while Ashton retained 82%.

In 1984, ADM had been qualified as a minority business under the Small Business Administration's "8(a)" program, and in February 1985, through that program, ADM was awarded a contract to supply small computers and associated services to the United States Army. Over the next several years, ADM underwent a dramatic expansion of the scale and scope of its operations. In order to serve the needs of the forward-deployed Army forces overseas, ADM established branch offices in Korea and Germany, and hired two new vice-presidents to oversee operations in those areas: David Bowers for Asia; and Terence Sweeney for Europe. During this same period, ADM hired Charles Roth as marketing vice-president, and Martin Segal as its chief financial officer; both Roth and Segal worked out of ADM's home office in Washington, D.C.

Because the operations of ADM's foreign offices were restricted either by host country law or the host country's agreements with the United States, ADM set up foreign affiliates to pursue non-Army business in those areas. In Asia, those affiliates were two Hong Kong companies named Swaffham and Gemona, supplemented by a Guam corporation named ADM Asia. In Europe, ADM set up a German firm named ADM Hard- und Software Handelgesellschaft

GmbH ("ADM H&S"). In each case, the regional vice-president of ADM--Bowers in Asia, and Sweeney in Europe--received 25% of the equity in the regional firms, and was placed in general charge of their operations. Ultimately, transactions involving these ADM affiliates became the focus of the indictment in this case, but they were not the precipitating cause of the government's investigation of ADM.

Instead, the principal cause was the disaffection of Bowers, the Asian regional vice-president, and Roth, the marketing vice-president, with their positions at ADM. Although their precise grievances and objectives are somewhat obscure on this record, apparently both Bowers and Roth believed that had been promised--or could obtain--equity positions in ADM, if only they could, in Bowers' own testimony to the Grand Jury, "get rid of Mr. Dale" (JA817). In June 1987, Roth was fired from ADM, and Bowers resigned in August 1987.[3] On his way out in August, Bowers stole all of the remaining funds belonging to the ADM Hong Kong affiliates by forging corporate minutes to give himself sole signing authority and then transferring the funds to another company under his exclusive control. (a10-11; JA2114,2149). In the meantime, Bowers and Roth had retained a lawyer who demanded payments totalling $1.5 million from ADM. The demands were refused.

Ten months later, federal agents appeared at ADM's office with a search warrant that had been obtained primarily on the basis of unverified--and false--allegations of government contract fraud made by Bowers and Roth against ADM.

The Government's Investigatory Activities and the Search

In February 1988, Bowers was questioned by an agent of the Defense Department's Defense Criminal Investigation Service ("DCIS") concerning allegations against Bowers on a matter unrelated to ADM. In that connection, Bowers--later joined by Roth and two other disaffected former employees of ADM--began to make allegations of wrongdoing against ADM, Ashton, and Dale, primarily focused on product substitution under ADM's Army

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[3] While they were still working for ADM, Bowers and Roth had set up their own separate firm to compete with ADM (JA1781-83).

contract.

Those allegations were repeated in an affidavit dated June 14, 1988, by DCIS Special Agent Heide Shintani (JA253-60)[4] submitted in support of an application for a search warrant (JA252), which was issued by Magistrate Dwyer on that same date (JA249). There is nothing in the record to indicate that Shintani did anything at all to verify the allegations, including the obvious and simple step of checking with the Army. Had she done so, she would have discovered that the product substitution allegations were entirely without substance: from the outset of the contract in 1985, Army officials were aware of and approved the use of a different brand of hard disk drive in the Wang computers that ADM was supplying to the Army, which in fact improved the quality and cost-effectiveness of the product to the Army (see JA267-87), and there were Army records verifying this fact (JA284). Ultimately, the court of appeals ruled that these facts, while indicating that Shintani was negligent (a40), as a matter of law did not constitute a substantial preliminary showing that she was reckless, and that ruling creates one of the questions presented (#2) for this Court's review.

The search warrant was executed on June 16, 1988, by fifteen federal agents who searched throughout ADM's offices for 10 hours and seized 75 boxes of materials, some of which were later used at trial. Agent Shintani apparently was present at the search, but there is no finding in this record that her affidavit was served with the warrant or was present at or used in conducting the search. The court of appeals, after holding that the warrant in itself "was not sufficiently particular" (a44-45), noted that "it is not altogether clear that the affidavit accompanied the warrant at the search" (a48), but nonetheless ruled that Shintani's presence at the search "sufficiently limited the discretion of the executing agents" (a48), thus framing the other Fourth Amendment question presented (#1) by this Petition.

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[4] Shintani's affidavit described ADM as "purports to be minority owned and operated" (JA253), and misstated the ownership shares(JA254). At that point, the allegations of tax evasion were a minor afterthought (JA258-59) to the main thrust of government contract fraud, which also was supplemented by allegations of rebates, payoffs, etc., all of which were unsubstantiated.

The product substitution aspect of the government's activities came to naught when the government's agents later discovered the truth. No charges were brought on that ground. Nonetheless, the government continued to target ADM and its officers, under a new theory also invented by Bowers and Roth, and when the indictment issued some eighteen months later, it was based upon this new theory of a tax evasion conspiracy.

The Indictment and the Challenged Transactions

On January 11, 1990, the Grand Jury returned a 10-count indictment (JA141-74) against ADM, Ashton, Dale, Sweeney, and Segal. The only present or former officers of ADM that were not charged were Bowers and Roth, who were providing the government with its theory of prosecution.

Count 1 of the indictment was an all-encompassing conspiracy charge under both the "defraud" and "offense" clauses of 18 U.S.C. §371, alleging an overall goal of "defrauding the United States of tax revenues" (JA146). The substantive counts 2-10 alleged offenses under 18 U.S.C. §§ 1001 & 1343, and under 26 U.S.C. §§7201 & 7206, based on conduct that completely overlapped with count 1.[5]

In essence, the government's case was based on challenges to the bookkeeping treatment of six different transactions or series of transactions involving the ADM regional affiliates--four in Asia and two in Europe. The precise timing of these transactions and their subsequent tax treatment is important to an understanding of the federal criminal law issues presented by this Petition.

Of the four Asian transactions, all of which were orchestrated by Bowers, one--a loan from ADM funds through the Guam affiliate to another ADM affiliate in the United States--had no potential income tax consequences at all, as a loan is neither income nor expense. The other three were: (1) cash advances to Ashton and Dale during 1986 from ADM's Korean bank account, which were reported as personal income by Ashton in an amended 1986 return filed in December 1987, and by Dale in his 1987 return; (2) $417,532 paid

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[5] As the indictment charged offenses under federal criminal statutes, the district court had original jurisdiction under 18 U.S.C. §3231.

by ADM in 1986 for consulting and marketing services by the Hong Kong affiliates, which was never claimed as a tax deduction by ADM; and (3) a 1986 accrual of $500,000 in respect of further services to be invoiced in the future by one the Hong Kong affiliates, Swaffham, which was reversed in an amended corporate tax return filed on March 30, 1989, after ADM's non-Army Asian activities had fallen apart in the wake of Bowers' departure.

The two European transactions both involved payments by ADM to an unrelated Swiss firm named Bourbonia for consulting services. The first payment of $316,000 in December 1986 was reversed in an amended corporate income tax return filed on August 25, 1988. The second payment of $102,655 was never claimed as a tax deduction by ADM. In both cases, the expenses were reallocated to ADM H&S, the European affiliate, on the rationale that the consulting services, which related to non-Army business, should be borne by that entity, whose ownership shares differed from the parent firm, ADM.

Significantly for the questions presented in this Court, the substantive tax counts of the indictment (Counts 2-4) only challenged two of these transactions--the $500,000 Swaffham accrual, and the $316,000 payment to Bourbonia, both of which were the subject of amended corporate tax returns filed long before the indictment issued, but after the government's misguided search of ADM's offices.

The remaining counts of the indictment were purely derivative: Count 5 charged that the payment of the same $316,000 to Bourbonia by wire transfer also constituted wire fraud in violation of 18 U.S.C. §1343, and Counts 6-10 charged Ashton, Dale, and ADM with violations of 18 U.S.C. §1001, based upon alleged failures to disclose Ashton and Dale's interests and directorships in the ADM Hong Kong affiliates (which were wholly owned by U.S. citizens) as "foreign connections" or "foreign interests" in various forms filed with the Defense Department concerning ADM's Army contract.

The substantive counts all involved alleged offense conduct completed prior to November 1, 1987, the effective date of the federal sentencing guidelines. However, and significantly to the sentencing issues here presented, the conspiracy was alleged to have

"continued" beyond that date, primarily through actions allegedly "misleading the Internal Revenue Service" (JA164) by filing amended tax returns (see JA164-66).

Proceedings in the District Court

In the district court, the defendants moved to dismiss the indictment for Grand Jury abuse and for substantive insufficiency, and to suppress the fruits of the government's search of ADM's offices. Defendants also moved to suppress tape recordings purportedly made by Bowers and Roth of telephone conversations with Ashton, Dale, and other ADM employees during 1987, on the ground that the recordings were made in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968. The district court denied all of these motions, and also denied defendants' request for an evidentiary hearing on the question whether the false product substitution allegations were knowingly or recklessly included in the Shintani affidavit.

At trial, defendants further objected to the admission of the tape recordings on the ground that they were untrustworthy, and in support of their objection submitted an expert's report finding physical and scientific evidence of tampering and alteration of the tapes. On the basis of testimony by Bowers and by a government agent who had custody of the tapes prior to trial, the district court ruled the tapes admissible, without making any preliminary finding of either their authenticity or their reliability.

Following trial, all defendants were convicted on all counts of which they were charged. Petitioner Dale was convicted on Counts 1, 2, 4, 5, 7, 9, and 10. Following the verdict, the district court ruled that Count 1 was subject to sentencing under the guidelines (a148). Petitioner was sentenced to 41 months' imprisonment on that Count, and to concurrent 30 month sentences on each of the remaining counts, plus 3 years of supervised release, $675,000 in fines, and approximately another $60,000 in assessments and costs of incarceration and supervised release. (JA1831-35).

Of course, there was no restitution ordered by Dale or any of the other defendants, because there was no tax deficiency.

Proceedings in the Court of Appeals

All defendants appealed their convictions and sentences to the D.C. Circuit. Following briefing and argument on appeal, the court of appeals took the unusual step, in its order of January 8, 1993 (a71-73), of remanding the case for "a clarification of the district court's ruling and the reasons in support thereof" (a73) on the application Title III to the Bowers/Roth tape recordings used at trial. With its responsive memorandum order filed on January 21, 1993 (a74-75), the district court transmitted two undated and previously unfiled memoranda, one on the Title III questions (a77-81), and the other, more pertinent here, on the Fourth Amendment questions presented by the search of ADM's offices(a83-102). The parties then submitted supplemental briefs addressing these new documents (see a35, a38), which are called the "Tapes Memorandum" and the "Warehouse Memorandum" in the court of appeals' decision.

On April 6, 1993, the court of appeals rendered its judgment and opinion (a1-70), affirming all of the convictions but remanding for resentencing with instructions to vacate the sentences under Counts 2 and 3 for violations of 26 U.S.C. §7206, on the holding that those lesser offenses merged into the convictions on Count 4 for attempted tax evasion under 26 U.S.C. §7201 (a67-70). However, the court of appeals declined to apply this same principle to either the wire fraud charge in Count 5 or to the false statement charges in Counts 6-10 (a69n.61), expressly rejecting the defense argument that "the Internal Revenue Code supplies the exclusive basis for tax fraud prosecutions" (a49). The court of appeals further rejected the defense's objections to the jury charge on the "defraud" branch of 18 U.S.C. §371, the definition of "deductible expense," the defense of truth to a charge under 18 U.S.C. §1001, and the definition of reasonable doubt (see a52-58).

The court of appeals disagreed in part with the district court's Fourth Amendment analysis in the recently forwarded "Warehouse Memorandum," and ruled that "the warrant, by itself, was not sufficiently particular" (a44-45) to comply with the Fourth Amendment. Furthermore, though the court of appeals felt that the warrant included sufficient words of reference to incorporate the Shintani affidavit, it found that the record failed to show that "the affidavit accompanied the warrant at the search" (a48).

Nevertheless, the court of appeals declined to suppress, holding that the presence of the affiant at the search could substitute for the presence of the affidavit (a48), thus joining in a growing conflict among the circuits on this point. The court of appeals also upheld the district court's denial of an evidentiary hearing on the false allegations contained in the affidavit (a38-43).

The court of appeals further upheld the district court's admission of the tape recordings without a preliminary finding, interpreting the district court's inaction as an "implicit" finding (see a36, 38) that "was not an abuse of discretion" (a36). Similarly, the court of appeals also approved the district court's application of the sentencing guidelines to Count 1 on the "straddle" theory (a58-60), and rejected the defense's objections, inter alia, that the sentencing judge had failed to make the requisite findings of each defendant's participation in each of the object offenses by a reasonable doubt standard, as required by guidelines commentary, by referring to the district court's "adoption" of the presentence investigation reports (see a59 & n.54; a61).

Defense motions for rehearing, including one by Petitioner Dale, were denied on June 16, 1993 (a161).

REASONS FOR ALLOWING THE WRIT

I. There Is a Direct and Substantial Conflict among the Circuits on the Important Fourth Amendment Question Whether an Invalid General Search Warrant Can Be Cured by Reference to an Affidavit that Does Not Accompany the Warrant at the Search.

The Fourth Amendment provides that "no Warrants shall issue, except upon probable cause, . . . and particularly describing . . . the . . . things to be seized." U.S. Const., amd. IV. One might think that, of all the possible issues presented under the Fourth Amendment, this simple and indeed minimal requirement of governmental regularity, explicitly set forth in the constitutional text, would be relatively straightforward in application: either the warrant meets the particularity requirement, in which case it is lawful; or it does not, in which case the search is unlawful and any

evidence seized should be suppressed. But such simplicity is not the case in the lower federal courts today. To the contrary, there is a sharp conflict among decisions of the federal courts of appeals, including the decision below in this case, on just how far the government may deviate from its responsibilities before the individual's constitutional right will be enforced.

The precise issue decided here stems from a body of doctrine developed in the lower federal courts in response to the obviously frequent occurrence--judging from the large number of reported decisions--that the warrant itself plainly does not meet the Constitution's particularity requirement, as the court of appeals held here (a44-45).[6] In that context, the general doctrine has evolved that the government's violation of the Fourth Amendment will be excused or "cured" by reference to the underlying affidavit in support of the warrant application, assuming it is sufficiently descriptive, where: (1) the affidavit's description is incorporated by reference in the warrant; and (2) the affidavit "accompanies" the warrant at the search.[7]

That development alone would merit this Court's attention. But the development, and the divisions among the federal courts of appeals, extend much further, both to varying interpretations of the excusing criteria and to the questions whether both, either, or neither of the two excusing elements are necessary to a decision permitting the fruits of the search to be used. The First,[8] Second,[9] Third,[10] Ninth,[11] and Tenth[12] Circuits require the affidavit to be

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[6] Thus, this Court's decision in *Andresen v. Maryland*, 427 U.S. 463 (1976), is not implicated here.

[7] For a discussion of the general authority in this area, see 2 W. LaFave, Search and Seizure §4.6(a)(2d ed. 1987). And see the cases cited below.

[8] *United States v. Falcon*, 959 F.2d 1143 (1st Cir. 1992); *Application of Lafayette Academy*, 610 F.2d 1 (1st Cir. 1979).

[9] *United States v. George*, 975 F.2d 72 (2d Cir. 1992).

[10] *United States v. Johnson*, 690 F.2d 60 (3d Cir. 1982).

both incorporated by reference and to accompany the warrant, while the Fourth,[13] Eighth,[14] and Eleventh[15] Circuits permit either element to suffice. The law of the Fifth and Sixth Circuits is unclear, but a Sixth Circuit decision on the related requirement of particularity in describing the place to be searched suggests that neither of the excusing elements would be strictly required in that court.[16]

Prior to the decision below in this case, the D.C. Circuit appeared to require both excusing elements,[17] but by the decision in this case, the D.C. Circuit now has shifted into the category of those Circuits allowing only one of the two excusing elements to suffice, at least where, as here, there is an indication that the officer executing the affidavit was present at the search.

Furthermore, there is yet another layer of disagreement among the courts of appeals on the applicability of this Court's decision in *United States v. Leon*, 468 U.S. 897 (1984), in this context of deficient particularity in the warrant. One group of decisions reasons that *Leon*'s good faith exception is inapplicable, as *Leon*'s predicate of a facially valid warrant is not met where the description of things to be seized is not sufficiently particular on the face of the

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[11] *Center Art Galleries-Hawaii, Inc. v. United States*, 875 F.2d 747 (9th Cir. 1989).

[12] *United States v. Leary*, 846 F.2d 592 (10th Cir. 1988).

[13] *United States v. Washington*, 852 F.2d 803 (4th Cir. 1988).

[14] *United States v Tagbering*, 985 F.2d 946 (8th Cir. 1993); *Rickert v. Sweeney*, 813 F.2d 907 (8th Cir. 1987).

[15] *United States v. Wuagneux*, 683 F.2d 1343 (11th Cir. 1982).

[16] *United States v. Gahagan*, 865 F.2d 1490 (6th Cir. 1989).

[17] *United States v. Maxwell*, 920 F.2d 1028 (D.C. Cir. 1990); *United States v. Vaughn*, 830 F.2d 1185 (D.C. Cir. 1987).

warrant.[18] A competing group of decisions applies *Leon* in this context,[19] holding that officers may reasonably rely on such a warrant, at least where there are other mitigating factors, such as the affiant's presence at the search.[20]

Thus, there is a continuing and indeed growing conflict among the courts of appeals on the criteria, if any, that will excuse the lack of sufficient particularity in a search warrant. The conflict is well-developed by the numerous reported decisions in the Circuits, and it rests fundamentally on a clash of principle: whether the particularity requirement is solely a matter of limiting the executing officers' discretion, or also extends to providing fair notice to the defendant of the items subject to seizure. The question is ripe for this Court's decision, and is of manifestly broad importance, as the issuance and execution of search warrants are the daily routine of law enforcement throughout the Nation.

II. This Court Should Review the Lower Courts' Application of its Prior Decision in *Franks v. Delaware*.

In *Franks v. Delaware*, 438 U.S. 154 (1978), this Court sought to establish guidelines for evidentiary challenges to the veracity of probable cause affidavits. The application of those guidelines made by the decision below would completely eviscerate the protections envisioned by this Court in *Franks*, by setting an impossibly high threshold standard for obtaining an evidentiary hearing. In this way, the decision below is in conflict with this Court's decision in *Franks*.

For purposes of this Petition, we limit our focus to the sole question of Agent Shintani's failure to seek any verification of the

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[18] *United States v. Leary*, 846 F.2d 592 (10th Cir. 1988); *United States v. Decker*, 956 F.2d 773 (8th Cir. 1992); *Center Art Galleries-Hawaii, Inc. v. United States*, 875 F.2d 747 (9th Cir. 1989).

[19] *United States v. Wuagneux*, 683 F.2d 1343 (11th Cir. 1982); *United States v. Weinstein*, 762 F.2d 1522 (11th Cir. 1985); *United States v. Luk*, 859 F.2d 667 (9th Cir. 1988).

[20] *United States v. Maxwell*, 920 F.2d 1028 (D.C. Cir. 1990); *United States v. Luk*, 859 F.2d 667 (9th Cir. 1988).

ex-employees' allegations of illegal product substitution in ADM's Army contract, which, as the district court noted, was "[t]he gravamen of the allegations in the affidavit"(a84). On this point, unlike some of the others raised below by the defense,[21] there is no question of the materiality of the allegations to the probable cause determination, nor is there any question on this record of the falsity of the allegations. The only question is whether Shintani's inclusion of those false allegations in the affidavit was a deliberate or reckless falsehood, or, more precisely under Franks, whether the defendants made "a substantial preliminary showing," *Franks*, 438 U.S. at 156, so as to require an evidentiary hearing.

In *Franks*, this Court described the requisite threshold showing as follows:

> "To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than merely a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished . . . ."

438 U.S. at 171. In this case, the defendants complied in every way with the requirements of *Franks*: they specifically identified the false allegations in the affidavit, and they submitted sworn statements by Army officials showing that the allegations were false (JA267-87), including a copy of an Army document showing the Army's full awareness and approval of the products being delivered (JA284). This showing demonstrated not only that the allegations were false, but also that it would have been extremely simple for Shintani to discover that fact with a minimal amount of effort.

Nonetheless, the defendants were denied an evidentiary hearing

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[21] The defendants also challenged Agent Shintani's reliance on the credibility of her "informants," the ex-ADM informants (see a40-42).

in the district court, and that ruling was affirmed on appeal. The court of appeals' decision noted a split in the Circuits on the standard of review on appeal from a denial of a Franks hearing (a39n.44), but it did not choose between them, holding that the district court's determination could be affirmed under either a clearly erroneous or a *de novo* standard, thus effectively ruling as a matter of law.

But aside from references to the general principle that an affiant is not required to exhaust every possible lead, and the court of appeals' somewhat paranoic speculation that "Shintani's failure to contact Army officials may have been entirely prudent given the possibility of a leak back to ADM" (a40),[22] the court of appeals' analysis consists only of announcing its legal conclusion that "the agent's actions amounted to *at most* negligence which is insufficient to warrant a *Franks* hearing" (a40 (emphasis by the court of appeals)).

If the court of appeals' ruling represents a correct interpretation of the *Franks* standard, then *Franks* should be recast or overruled, because it certainly is not achieving its purpose of controlling the use of false allegations by government affiants, for it is difficult to imagine a more aggravated situation of recklessness than the one presented here. After all, Agent Shintani was not a policewoman walking a beat or even an FBI agent. She was an employee of the investigative arm of the Defense Department, the same Department that includes the Army and that is charged with the protection of this Nation's security and its most sensitive secrets. If the failure of such an agent to do any checking within her own Department to verify allegations from untested informants does not, as a matter of law, make even a "substantial preliminary showing" of reckless

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[22] There is no evidence in the record to support this speculation. The court of appeals apparently was referring to the an allegation in Shintani's affidavit that ADM would "certainly destroy" documents if subpoenaed (see a40), attributed by the affidavit to a source interviewed two days *after* the purported execution date of the affidavit (see JA256). Even crediting that allegation, it is difficult to see what it would have to do with a confidential consultation with Army officials or with a review of the Defense Department's own files, which would have revealed the truth and could not have been destroyed by ADM.

disregard for truth, then what does? Furthermore, how do appellate courts distinguish as a matter of law between negligence and recklessness, especially on a preliminary record such as this? If they cannot do so, should the *Franks* standard be reconsidered?

These questions all merit this Court's attention, in this important aspect of Fourth Amendment law that also is a part of the daily routine of law enforcement.

III. This Court Should Settle the Important Question of the Threshold Standard of Admissibility for Tape-Recorded Evidence under the Federal Rules of Evidence.

Just recently, in *Daubert v Merrell Dow Pharmaceuticals, Inc.*, --- U.S. —, 113 U.S. 2786 (1993), this Court settled the uncertain question of the threshold standard of admissibility for expert and scientific evidence under the Federal Rules of Evidence. This case presents the analogous question for another important category of evidence--tape-recorded evidence of telephone conversations--that is equally or more unsettled in the lower federal courts, and to some extent is an aspect of the same question involved in *Daubert*, because sound recordings in effect are scientific evidence.

The questions presented here are broadly important, because sound recordings--which already are common in criminal prosecutions--are likely both to be used more frequently in all types of litigation and to present unique problems of reliability, because they are so easily altered or falsified by sophisticated means that lay juries are unlikely to detect.

The admissibility threshold for sound recordings is all the more appropriate for this Court's attention because of the changes wrought by the Federal Rules of Evidence, which on their face do not treat the unique problems of sound recordings in any systematic way and leave a doctrinal ambiguity in the assessment of sound recordings' reliability. In the decision below, as in other recent decisions, this doctrinal ambiguity has produced an erosion of the previously recognized standard of reliability. Moreover, that same ambiguity seems to be at least partially responsible for the failure of the decision below to observe this Court's prior decisions on the requirement of a preliminary determination under Rule 104 of the Federal Rules of Evidence.

A. The Reliability Threshold

Prior to the enactment of the Federal Rules, the reliability of sound recordings usually was treated as an aspect of the common-law evidence doctrine of competency.[23] On that basis, the lower federal courts evolved a general approach that is exemplified by the D.C. Circuit's own prior decision in *United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977), which established a threshold reliability requirement that the recordings be authentic, accurate, and trustworthy, and required the trial court to find that "the possibilities of misidentification and adulteration eliminated, not absolutely, but as a matter of reasonable probability," *Haldeman*, 559 F.2d at 107.

However, since the enactment of the Federal Rules of Evidence, the approach of Haldeman and similar cases has been eroded by the lack of any clear doctrinal basis in the Federal Rules for applying the threshold standard of competency,[24] and that development is exemplified by the court of appeals' decision in this case, which essentially conflates the *Haldeman* standard into the distinct requirement of authentication (see a36-38), and thereby deprives the district court of its essential function of screeening out unreliable evidence that the jury is unable fairly to evaluate.

The problems thus created are aptly illustrated by the context in which the issue arose in this case in the district court. Unlike most prior federal decisions involving sound recordings--where the recordings had been made in the carefully supervised environment of government wiretapping orders--but like the probable future context of these issues in both civil and criminal litigation, here the tapes proffered by the government purportedly were made by private individuals, Bowers and Roth, using their own equipment,

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[23] On the distinction between competency and relevancy, see generally 9 Wigmore on Evidence §2550 (Chadbourn rev. 1981).

[24] *See, e.g., United States v. Slade*, 627 F.2d 293 (D.C. Cir.), cert. denied, 449 U.S. 1034 (1977); *United States v. King*, 587 F.2d 956 (9th Cir. 1978); *United States v. Sandoval*, 709 F.2d 1553 (D.C. Cir. 1983); *United States v. Lance*, 853 F.2d 1177 (5th Cir. 1988); *United States v. Sandoval*, 960 F.2d 587 (6th Cir. 1992).

by their own private means and for their own private motives. There was no officially supervised recording, no specially trained operators, and no elaborate chain-of-custody testimony to eliminate the problem of tampering or alteration.

To the contrary, there was obvious physical evidence of tampering with the tape housings and a scientific analysis by a defense expert finding electronic evidence of alteration (JA824-906). But the district court simply threw the question to the jury, without any preliminary finding or resolution of the scientific issues presented, and the court of appeals affirmed that decision, essentially on an abuse of discretion standard.

But the reliability questions raised in the district court were quite different from the typical problems of authentication addressed by Federal Evidence Rule 901, or by the "Best Evidence" Rule provisions of Article X of the Federal Rules. The questions of where and how, under the Federal Rules, questions of this sort should be addressed, are questions that ought to be settled by this Court.

A sensible approach would be to recognize that sound recordings in fact are a form of scientific evidence, and therefore are directly subject to the *Daubert* standard of reliability. Sound recordings are neither testimony nor documents in the usual sense, but are, in effect, "mechanical" or "electronic" testimony as to particular historical events, and therefore depend for their probative force on the reliability of the equipment, procedures, and underlying scientific principles used to create the recording. Thus, sound recordings--at least those whose accuracy is questioned--are more analogous, for example, to x-rays than to ordinary photographs,[25] and therefore should be subject to the standards of scientific reliability.

Whether this approach should be taken, or some other is more appropriate under the Federal Rules, is a decision that should be made by this Court now, rather than allowing the lower courts to

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[25] For a discussion of the distinction between the "demonstrative" theory sometimes applied to ordinary photographs and the "silent witness" theory of scientific foundation usually required for x-rays, and a consideration of the sound recordings in this context, see 2 McCormick on Evidence §214 (4th ed. 1992).

continue struggling with the problem for years to come, to the detriment of the fairness and efficacy of federal trials.

B. The Preliminary Determination

Regardless of the appropriate threshold showing, the decision below was incorrect in excusing the district court's failure to make a preliminary determination of either reliability or authenticity under Rule 104, under this Court's prior decisions in *Bourjaily v. United States*, 483 U.S. 171 (1987), and *Huddleston v. United States*, 485 U.S. 681 (1988).

If a reliability finding is required, then the district court's failure to make an explicit finding of the preliminary fact under Rule 104(a), as interpreted by this Court in *Bourjaily* to require the application of a preponderance standard, plainly was error. *See also Daubert*, 113 S. Ct. at 2796 & n.10. But even if the only prerequisite was a sufficiency determination under Rule 104(b)--as, for example, would be the case if only the Rule 901 authentication standard is applicable--then this Court's decision in *Huddleston* still requires that the district court "decides whether" the sufficiency showing has been made, *see Huddleston*, 485 U.S. at 689.

Under either standard, the district court is not permitted to do nothing, nor does it have the "discretion" whether or not to make the preliminary determination, as the court of appeals apparently held here (see a36-38).

IV. This Court Should Review the Application of the General Federal Fraud and Conspiracy Statutes to Income Tax Offenses.

What is the public policy justification for federal prosecutors' well-known proclivities to multiply the counts of their indictments by charging violations of the general federal conspiracy, fraud, and false statement statutes in virtually every imaginable context?

Surely, it is not to make prosecutors' lives easier, nor to maximize the coverage of the federal net of criminalization, nor to place a large part of the citizenry in fear of federal incarceration. Nor can it be to permit federal prosecutors or juries to make up the crimes as they go along, for that would contradict the fundamental precepts of legality in criminal law. And particularly where the

Congress has acted to regulate an area of activity very specifically, and defined an intricate technical sequence of specific criminal offenses--as in the case of the Internal Revenue Code--what justifies the continued application of these vague general statutes to criminalize what the Congress may have chosen to exclude from the criminal sanction, for good reason?

These questions have not much troubled the lower federal courts in recent years, although there are some notable exceptions, particularly in the context of tax offenses. The Sixth Circuit's decision in *United States v. Minarik*, 875 F.2d 1186 (6th Cir. 1989), raised the problem of "allow[ing] the fact situation to define the crime," 875 F.2d at 1191, in the context of applying the "defraud" clause of 18 U.S.C. §371 to a situation otherwise governed by 26 U.S.C. §7206, which is one of the charging statutes involved here. And the well-regarded District Judge Weinfeld of New York raised a similar concern in *United States v. Henderson*, 386 F. Supp. 1048 (S.D.N.Y. 1974), in the context of the cumulative application of the mail fraud and internal revenue offenses. Neither decision has been very popular in the other lower federal courts,[26] including the courts below in this case.

But then again, the "intangible rights" theory of the federal mail and wire fraud statutes was extremely popular in the lower federal courts before this Court disapproved the theory in *McNally v . United States*, 483 U.S. 350 (1987) and *Carpenter v. United States*, 484 U.S. 19 (1987); *see also Tanner v. United States*, 483 U.S. 107 (1987)(limiting the scope of 18 U.S.C. §371), and the reasoning of *McNally* was to some extent anticipated by Judge Weinfeld in *Henderson* and relied upon by the Sixth Circuit in *Minarik*.

What is perhaps most remarkable and significant about the expansion of the general fraud and conspiracy statutes into the area

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[26] for decisions distinguishing or criticizing *Minarik*, see, e.g., *United States v. Hurley*, 957 F.2d 1 (1st Cir. 1992); *United States v. Bilzerian*, 916 F.2d 1285 (2d Cir. 1991); *United States v. Arch Trading Company*, 987 F.2d 1087 (4th Cir. 1993); *United States v. Money*, 949 F.2d 899 (6th Cir. 1991), and the district court's opinion in this case on the motions to dismiss the indictment (a106-11). The court of appeals' decision below collects authorities criticizing *Henderson* (a50), although the court conceded that the decision "gives us some pause" (a49).

of tax offenses is the extent to which the development has proceeded without the considered approval of this Court. The entire idea of a violation of the "defraud" clause of 18 U.S.C. §371 through a conspiracy to evade income taxes appears to have originated with the Second Circuit's decision in *United States v. Klein*, 247 F.2d 908 (2d Cir. 1957), and the theory often is called a "Klein conspiracy" after that decision. But our research has failed to locate a single instance in which this Court has even cited *Klein*. Moreover, even the "offense" clause of 18 U.S.C. §371 to a tax offense appears to have been involved significantly in only one decision of this Court, *United States v. Ingram*, 360 U.S. 672 (1959). *Ingram* does not endorse the application of the "offense" clause to attempted tax evasion, which is not as straightforward as might at first appear, given the special characteristics of tax offenses as they have been defined by the Congress and construed by this Court.

Therefore, this very important area of the law appears not to have been considered systematically by this Court, but to be primarily an artifact of extensive development in the lower courts, as was the "intangible rights" doctrine. That factor stands in contrast to the Court's prior attention to the substantive tax offenses, emphasizing the integrated nature of the Internal Revenue Code's offense structure, as establishing "a penalty suitable to every degree of delinquecy," *Spies v. United States*, 317 U.S. 492, 497 (1943); *see also Sansone v. United States*, 380 U.S. 343, 351 (1965), which in its "capstone" offense under 26 U.S.C. §7201 is strictly limited by a stringent mens rea requirement, *see Cheek v. United States*, 111 S. Ct. 604 (1991); *United States v. Pomponio*, 429 U.S. 10 (1976); *Bishop v. United States*, 412 U.S. 346 (1973).

There is an obvious tension between the strict and integrated interpretation of the Internal Revenue Code offenses by this Court, and the expansive importations of the general fraud and conspiracy statutes into the tax context by the lower courts, which merits this Court's attention.

The potential abuses of the expansive charging practices in the lower courts are amply illustrated by the situation in this case, where tax convictions were obtained without any actual or realistically threatened revenue loss to the government. The only

tax "evasion" that occurred here was in the imagination of the prosecutors, or, even viewing the evidence in the light most favorable to the government, in the imaginations of the defendants. But thoughts are not crimes, and the imposition of the criminal sanction here is very probably unnecessary and counterproductive from the standpoint of the criminal law, and almost certainly detrimental to the government's interest in maintaining a system of revenues based primarily on self-assessment and self-correction.

The indictment here challenged a total of six transactions in its expansive conspiracy count, only two of which were challenged as constituting an attempt to evade under 26 U.S.C. §7201 or a lesser included tax offense. Thus, the conspiracy count alone expanded the reach of criminalization beyond that permitted by Congress in the substantive tax offenses, in effect to reach back into an earlier stage of development that the Congress chose *not* to criminalize in the tax code--precisely the problem that troubled the Sixth Circuit in *Minarik*.

Furthermore, the same problem arises under either clause of 18 U.S.C. §371, as applied even to the most serious of the tax offenses. Under the "offense" clause, the application of §371 creates an offense of "conspiracy to attempt to evade," which is an oxymoron in terms of general criminal law, which recognizes either conspiracies or attempts, but not conspiracies to attempt--a concept that, so the extent it has any coherence at all, simply is too far removed from the threatened harm. Under the "defraud" clause, §371 effectively would criminalize that which is not a crime at all, because, by definition, the underlying conduct was insufficient to support even the charge of "conspiracy to attempt to evade."

In this context, the logic of *Minarik* is entirely sound: if the prosecutors cannot charge under the specific Congressional prohibition, then they should not be permitted to charge under the general statutes. Absent some affirmative indication of Congressional intent to the contrary, it is not logical to suppose that the Congress took great pains to define the specific tax crimes only to have those prohibitions trumped by the vague prohibitions of the general statutes. At least, if that is to be the law of the United States, it should be so declared by this Court.

Furthermore, in examining these questions, the Court should re-

examine its interpretation of the offense definitions in the Internal Revenue Code itself, to determine whether the actus reus requirement should be sharpened from the current standard of "any affirmative act," based on this Court's decisions in *Spies* and *Sansone*. To some extent, this formulation suffers from the same problems of vagueness and prematurity as the expansive applications of the general fraud and conspiracy statutes, as there is no bright-line test for incurring criminal liability. Under these circumstances, the absence of a "safe harbor" from criminal liability actually may impair the efficacy of the tax-collection system, by giving taxpayers an affirmative disincentive to correct prior errors, and in this regard it is of no moment whether the prior errors were deliberate or not. If a taxpayer knows that it will obtain no protection from self-correction, or, worse yet, that it will increase its exposure by self-correction--as appears to have occurred in this case, where only the self-correcting acts of filing amended returns were charged as substantive tax offenses--then obviously taxpayers will have a disincentive to correct those errors. The same level of deterrence can be obtained, with more efficiency in tax collections, by more sharply defining the point of criminal liability.

Finally, to the extent that the Court examines this subject, it also should review the errors assigned by the defendants to the district court's instructions on the offenses involved, which are framed in paragraph 7 of the questions presented by this Petition.

V. The Reasonable Doubt Definition Applied Below Was Unconstitutional.

The district court's jury instruction defining "reasonable doubt," and the court of appeals' failure to reverse on that basis (a57-58), are inconsistent with this Court's decision in *Cage v. Louisiana*, 498 U.S. 39 (1990) (per curiam), which held a similar instruction unconstitutional as a violation of the Due Process clause. Like the instruction in Cage, the district court's definition here placed undue emphasis on the amount of uncertainty required for acquittal, stressing that the jurors had to be "so uncertain" that they did not have an "abiding conviction" of guilt. Furthermore, the phrase "a doubt for which you can give a reason" was inappropriate, particularly as it followed immediately after the phrase "a doubt

based on reason" (see a57), thus indicating to the jurors that something more than reasonable doubt was required, and implying that the jurors that they could be called upon to justify their doubts to the court.

VI. The Sentences Below Disregarded Sentencing Commission Commentary.

In *Stinson v. United States*, —U.S.—, 113 U.S. 1913 (1993), this Court held that Sentencing Commission commentary that interprets or explains a sentencing guideline is binding on the federal courts. That decision requires that Petitioner's sentence on the conspiracy count be vacated, because the district court failed to follow commentary to USSG §1B1.2 requiring that sentencing on a multi-object conspiracy count be predicated upon a finding by the trial court, applying a reasonable doubt standard, that the defendant was responsible for each object of the conspiracy. The commentary is clearly set forth in Application Note 5 to that section and the accompanying statement by the Commission upon the addition of that note (see a169-70). Both the district court and the court of appeals disregarded the reasonable doubt standard (see a61). Although the conspiracy here was alleged to have only the single object of income tax evasion, it embraced several different object offenses. Because the guidelines essentially "pass through" the conspiracy count to the underlying object offense, a trial court finding of guilt beyond a reasonable doubt is necessary as to each one of the object offenses under the guidelines, because a jury verdict logically could rest on any one of them and therefore the verdict itself establishes none.

VI. The "Straddle" Theory of Guideline Sentencing Was Unconstitutional as Applied in this Case.

The decision below applied the so-called "straddle" theory to sentence the Petitioner under the sentencing guidelines only on Count 1, while all other counts were sentenced under pre-guidelines law (see a58-60). Whatever the merits of the "straddle" theory more generally, as applied here the theory violates the Double Jeopardy Clause's prohibition against multiple punishments because

it bases two legally distinct sentences--both guidelines and pre-guidelines, on exactly the same conduct. This effect results from the "relevant conduct" provisions of the guidelines, which require the consideration of an entire course of allegedly related conduct, *see* USSG §1B1.3, and thus force a duplicative sentence, which violates Double Jeopardy unless the pre-guidelines conduct is separated out and sentenced solely under prior law, *United States v. Niven*, 952 F.2d 289 (9th Cir. 1991). Furthermore, if the pre-guidelines conduct is not separated out from consideration from the guidelines sentence, then the guidelines as applied would have the retrospective effect of increasing the total sentence for offense conduct that was, by definition, complete prior to the effectiveness of the guidelines, and in that instance also would violate the Ex Post Facto clause under the standards of this Court's decision in *Miller v. Florida*, 482 U.S. 423 (1987).

Conclusion

For the reasons stated above, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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September 14, 1993

APPENDIX

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 18, 1992 Decided April 6, 1993

No. 91-3228

UNITED STATES OF AMERICA,

APPELLEE

v.

DAVID M. DALE,

APPELLANT

No. 91-3229

UNITED STATES OF AMERICA,

APPELLEE

v.

MICHELLE ASHTON,

APPELLANT

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

No. 91-3230

UNITED STATES OF AMERICA,

APPELLEE

v.

MARTIN SEGAL,

APPELLANT

No. 91-3231

UNITED STATES OF AMERICA,

APPELLEE

v.

AUTOMATED DATA MANAGEMENT, INC.,

APPELLANT

No. 91-3232

UNITED STATES OF AMERICA,

APPELLEE

v.

TERENCE SWEENEY,

APPELLANT

Appeals from the United States District Court
for the District of Columbia

(Criminal No. 90–00027)

Samuel J. Buffone for appellant David M. Dale in No. 91–3228.

Paul Mogin, with whom *Brendan V. Sullivan, Jr.* was on the brief, for appellant Michelle L. Ashton in No. 91–3229.

Alan M. Dershowitz, with whom *R. Stan Mortenson* and *Scott L. Nelson* were on the brief, for appellant Martin Segal in No. 91–3230.

W. Neil Eggleston, with whom *Laura S. Shores* was on the brief, for appellant Terence A. Sweeney in No. 91–3232.

Kenneth Michael Robinson was on the brief for appellant Automated Data Management, Inc. in No. 91–3231. *Robert F. Muse* also entered an appearance for appellant Automated Data Management, Inc.

Stephen P. Anthony, Assistant United States Attorney, with whom *Jay B. Stephens*, United States Attorney, and *John R. Fisher*, *Robert J. Meyer* and *Helene Kazanjian*, Assistant United States Attorneys, were on the brief, for appellee.

Before WALD, RUTH B. GINSBURG and HENDERSON, *Circuit Judges*.

Opinion PER CURIAM.

PER CURIAM: The defendants, a corporation and its officers, challenge their convictions and sentences on various counts of fraud against the United States and its agencies. For the reasons set out below, we affirm their convictions *in toto* but remand for resentencing pursuant to Part X(F) of this opinion.

I. FACTS

On appeal from a criminal conviction, this court must view the evidence in the light most favorable to the government, allowing it the benefit of all reasonable inferences that may

be drawn from the evidence and permitting the jury to determine the weight and credibility of the evidence. *United States v. Smith*, 964 F.2d 1221, 1223 (D.C. Cir. 1992); *United States v. Butler*, 924 F.2d 1124, 1126 (D.C. Cir.), *cert. denied*, 112 S. Ct. 205 (1991). So viewed, the evidence reveals the following material facts.

Defendant Automated Data Management, Inc. (ADM) is a Washington, D.C. firm founded in the early 1980s by defendant Michelle Ashton, its president. In late 1984, Ashton hired defendant David Dale as "Executive Vice-President" and at about the same time issued to him 18% of ADM's stock, retaining the other 82% for herself. In early 1985, ADM obtained a contract to sell computers to the United States Army under the "minority set-aside" program of the Small Business Administration (SBA).

In late 1985, ADM established offices abroad in Germany and Korea and hired a new vice-president to manage each: defendant Terence Sweeney in Germany and defendant David Bowers in Korea. In addition, defendant Martin Segal was hired as ADM's in-house accountant in September 1986 and later received the title "Chief Financial Officer."

In August 1987 Bowers left ADM after a falling-out with Dale and Ashton—and after secretly taping telephone conversations he had with each of them. Bowers subsequently assisted a government investigation of ADM's operations that led to the defendants' indictments and convictions. Those convictions were based on the defendants' allegedly fraudulent tax treatment of various financial transactions involving ADM's Asian and European operations and on certain alleged misrepresentations or nondisclosures on government forms completed by defendants Ashton and Dale. We now summarize the facts underlying the convictions.

A. Tax Fraud

All five defendants were convicted both of tax fraud and of conspiracy to commit tax fraud. While the substantive tax fraud counts involved only ADM's 1986 corporate return, the conspiracy count involved other aspects of ADM's operations

in both Asia and Europe. We describe separately the fraudulent activity relating to each location.

1. Asia

After taking charge of ADM's Korean operations, defendant Bowers determined ADM should take advantage of Asian business opportunities unrelated to its Army contracts. In order to circumvent legal restrictions on such activity,[1] Bowers, after consulting with Dale, arranged for Nancy Edwards, a legal adviser to ADM's Korean office, to set up a Guam corporation which would not be subject to the restrictions. Edwards and her husband incorporated Asia Management Systems, Inc. in late summer 1986. Soon thereafter the corporate name was changed to ADM Asia and ownership transferred to Ashton, Dale and Bowers. Ashton and Dale each acquired a 37.5% interest in the company, while Bowers received the remaining 25%. Upon Dale's instruction to acquire additional companies, Bowers arranged for Edwards to purchase four Hong Kong corporations, Capulus, Fossano, Swaffham and Gemona, which were apparently shells with no assets other than documents of incorporation. During late October and early November 1986 ownership of Swaffham and Gemona was transferred to Ashton, Dale and Bowers in the same percentages as ADM Asia.[2] There followed a number of financial transactions involving the related corporations on which the government based some of its tax fraud charges.

First, during 1986 Bowers arranged for Dale and Ashton to obtain payments totalling $50,000 from ADM funds channelled through the Korean office. Dale received $20,000 in February 1986[3] and Ashton received $20,000 in

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[1] Provisions in a "Status of Forces Agreement" prohibited ADM from doing business in Korea with any party other than the United States government.

[2] Ownership of the other two corporations was transferred to Bowers and his wife for their own development.

[3] On a visit to Korea, Dale gave Bowers a check from ADM for $50,000, purportedly to cover operating expenses. A deposit slip

May[4] and $10,000 in September.[5] Neither Dale nor Ashton reported these amounts as personal income on their 1986 federal income tax returns.

Second, between August 1986 and March 1987 ADM made three payments to related companies that it treated, falsely, as legitimate business deductions.

In August 1986, ADM paid $200,000 to Arlington Associates (Arlington), a company owned in equal shares by Dale and Ashton.[6] This payment was recorded in Arlington's books as a bank loan from Guam National Bank. Sometime in late summer or early fall 1986, Dale instructed Bowers to draft documents representing that the $200,000 payment was a loan to Arlington from Asia Management Systems, Inc., the Guam corporation that Ashton, Dale and Bowers had acquired on August 29, 1986, and subsequently renamed ADM Asia, Inc.

During December 1986 ADM paid a total of $417,532 to Swaffham and Gemona, the two Hong Kong companies acquired by Ashton, Dale and Bowers, for studies and services

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dated February 29, 1986, reflects a deposit to ADM's Korean checking account of a $50,000 check, less $20,000 received in cash. ADM's check register characterizes the transaction as simply a $30,000 deposit.

[4] During a visit to Korea by both Dale and Ashton, Dale gave Bowers two checks, each in the amount of $50,000, for "Korea Operating Expenses" and instructed Bowers to give him two signed checks for $10,000 each, with the payee left blank. These checks were later dated June 3, 1986, and made out to the order of "D.C. National Bank"—the funds were apparently used by Ashton to purchase a condominium.

[5] Bowers cashed a $10,000 check drawn on ADM's Korean checking account and sent the proceeds to Ashton who was in Hong Kong.

[6] At Dale's request, Bowers wrote a $205,000 check on ADM's Korean account, payable to his wife; the check was deposited into the Bowerses' joint checking account and Bowers then wrote a personal check to Arlington for $200,000.

never actually performed.[7] ADM recorded these payments as deductible business expenses.

Finally, in March 1987 Bowers and Dale created a phony debt of $500,000 to Swaffham and documentation to support it. The debt was for software development purportedly performed by Swaffham but actually performed by employees of ADM in Korea at a cost of only about $30,000.[8] The debt was treated as an accrual and deducted as a business expense on ADM's 1986 tax return.

2. Europe

In Germany, defendant Sweeney hired Larry Knight in February 1986 as a consultant to assist with the European operations. Later that same year, Sweeney and Knight formed an interim German partnership to enable ADM to take advantage of non-Army business opportunities in Germany until a German corporation could be established.[9] On November 18, 1986, a German corporation, ADM Hard- und

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[7] At Dale's direction, Bowers created three bogus invoices: two from Gemona, dated November 11 and December 15, 1986, seeking payment of, respectively, $89,000 and $185,422 for marketing and product studies, and one from Swaffham, dated December 15, 1986, seeking payment of $143,110 for consulting services. While visiting Washington, D.C. in December 1986, Bowers received from Segal three checks for the invoiced amounts, one signed by Ashton, the other two by Dale. Bowers deposited the checks into Gemona's and Swaffham's Hong Kong bank accounts.

[8] In February 1987 Dale told Bowers to create invoices for the work from either Swaffham or Gemona. They decided on the $500,000 amount only after some discussion and apparently based on how much they thought they "c[ould] get away with." *See infra* note 36. Incident to the arrangement, Bowers created a phony "Software Development Contract," backdated letters between Bowers and Swaffham and an invoice which he sent by facsimile to Dale.

[9] Apparently, German law prohibited ADM itself from entering into or performing any contracts other than the Army contract that brought it to Germany.

Software Handelgesellschaft GmbH in Deutschland (ADM H&S), was incorporated to assume the partnership's business.[10] Ownership of ADM H&S was divided among Ashton (37.5%), Dale (37.5%) and Sweeney (25%) and Knight was appointed general manager.[11]

Over the next two years, ADM made substantial payments to Bourbonia Invest AG, a Swiss investment firm operated by Gerd Wormer, an investment counselor and old friend of Knight. At trial, the government asserted and furnished evidence to show that these payments in fact accrued to the benefit of Ashton, Dale, ADM and ADM H&S and were fraudulently treated by ADM as business deductions.

The first Bourbonia payment, for $316,000, was made in December 1986, pursuant to two invoices signed by Wormer and dated December 11, 1986, a time when Sweeney and Knight were in the midst of a two-day meeting with Wormer at Wormer's home. One of the invoices sought payment for "Product Development Consulting for the period March 86, to December 86," Joint Appendix (JA) 1984, and the other "for Services rendered in accordance with letter contract as of March 11, 1986 for Machine Language Translation Research and Development Project," JA 1985. Request forms to ADM

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[10] As of that date the earlier partnership was dissolved and all of its business activities transferred to ADM H&S.

[11] The new corporation was capitalized with $88,000 paid by ADM, allegedly in return for research performed by Knight. To support the payment, Sweeney prepared and signed what can only be a back-dated letter which "authorized Mr. Larry Knight acting in behalf of 'Hard- und Software Handelgeselleschaft mbH fuer Deutschland' [sic] (H&S), a company which is the process [sic] of being licensed to operate in West Germany, to begin a market project to provide the basic guidance required to form a business plan and direct the efforts of ADM into these new markets." Joint Appendix 2032. The letter further stated: "Based on my negotiations, I estimate the cost of this project to be approximately $90,000. The project will be completed by the end of this year. I will develop a contract in the near future for your review and approval." *Id.* The letter was dated January 12, 1986, some seven or eight months before ADM H&S's corporate name was selected.

for checks to pay the Bourbonia invoices were marked "OK MS from D. Dale 12/22/86" and "Sent Via Bank Wire 12/22/86" and one of them was signed by Segal. ADM deducted the $316,000 payment as a business expense on its 1986 tax return. In late 1986, Bourbonia made a payment to ADM H&S of about $125,000 to purchase five vehicles, one for Knight's use and the other four to be leased to ADM., Inc. Sweeney and Knight characterized the payment as a loan, but the government maintains the funds came from the $316,000 Bourbonia payment and were never intended to be repaid, which in fact they were not.

The second Bourbonia payment was made in January 1988 pursuant to an invoice dated December 26, 1987, requesting payment of $102,655 for "consulting services for 1987 as per sep. agreement." Ashton signed a check request form dated January 5, 1988, indicating payment had been requested by Segal and authorizing payment of the requested amount. Dale signed a check to Bourbonia for $102,655 dated January 26, 1988.

Ashton and Dale both maintained investment accounts with Bourbonia at least as early as 1987. Forms filed with the IRS indicated that in 1987 each had $10,000–$50,000 in an account with Wormer, while in 1988 the balance in each account had grown to more than $100,000.

B. Other Fraudulent Activity

Apart from tax fraud, the jury also convicted Dale, Ashton and ADM of fraud in connection with four forms Dale and Ashton submitted to government agencies.

The first three frauds involved forms Dale and Ashton filed with the Department of Defense (DOD) in early 1987 to obtain a security clearance for ADM. In late January and early February 1987, Dale and Ashton each completed a DOD "Personnel Security Questionnaire," on which each responded "yes" to the question "Do you have any foreign property or business connections or have you ever been employed by or acted as a consultant or representative for a foreign government" and each identified the 37.5 % interest held in ADM H&S and ADM Asia. Neither mentioned any connection with

Gemona or Swaffham, although each had acquired a 37.5% interest in the two companies by November 1986. In early February 1987 each also completed a DOD "Statement of Full Disclosure of All Foreign Connections," purporting to "hereby explain and fully disclose my foreign connections" but listing only their interests in ADM H&S. Finally, about the same time, Ashton signed a DOD "Certificate Pertaining to Foreign Interests" in which she responded "no" to the question "Does your organization have interlocking directors with foreign interests." Dale also signed the document to certify that Ashton had authority to act on ADM's behalf.

The fourth fraud related to an "Application for Small Business Determination" Ashton filed with the Small Business Administration (SBA) on April 10, 1987. On the form she identified herself and Dale as officers of ADM and answered "yes" to the question "Are any of the persons listed [above as owners, partners, officers, directors, & principal stockholders] owners, partners, directors, officers, employees or principal stockholders in any other company?" In response to a direction to identify the other companies and offices held, however, she failed to mention her or Dale's interests in or positions with Arlington, Swaffham, Gemona, ADM, ADM H&S or ADM Asia.[12]

C. Bowers' Disaffection and Its Aftermath

According to Bowers, in early 1987 he became concerned about his future with ADM and about potential criminal liability. As a result, he took a number of measures in contemplation of departing ADM. First, in March 1987, he began to tape record telephone conversations he had with both Ashton and Dale, in an apparent effort to protect himself.[13] Next, in April 1987 Bowers withdrew about $100,000 from Gemona's and Swaffham's bank accounts, reasoning

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[12] Ashton identified no other companies or offices for herself and for Dale identified only a nonprofit organization of which he was an officer.

[13] At trial, Bowers explained:

that the funds represented his 25% interest in the two corporations. Later, sometime after mid-July, he withdrew the remaining money from the corporations' accounts, again, according to his testimony, to protect himself.[14] Finally, on August 14, 1987, Bowers faxed a resignation letter to Ashton in the United States.

In response to Bowers' resignation, Ashton and Segal flew to Korea and negotiations ensued during which Ashton, through Segal, attempted to persuade Bowers to turn over all business records, including all tape recordings of telephone conversations, to surrender his interests in ADM Asia, Gemona and Swaffham and to agree to several measures designed to protect the interests of ADM, Dale and Ashton.[15] Ultimately, Bowers returned to the United States, without succumbing to Ashton's demands, and sought legal counsel.

After Bowers' resignation ADM and its principals took steps to alter the tax treatment of many of the transactions described above.

First, sometime in August or September 1987, Segal informed ADM's outside accountant, Grant Thornton, that

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> I believed that one of the problems, if I was to extricate myself from a situation that I had put myself in, was that I wanted it clear that it wasn't just me that was giving directions and replying to requests, and I just wanted the record clear in that respect, I wanted to make sure that I was protected.

JA 1097.

[14] Bowers testified at trial: "I didn't want the money to be moved and then me made out to be—you know, everything tried to be erased like it never happened, and I be put in a position where I could be accused of things." JA 1109.

[15] At one point, Bowers was presented with a proposed settlement agreement under which he was to indemnify ADM, Ashton and Dale for any liability arising from the Korean activities, to refrain from testifying against them in a pending lawsuit by another ADM vice president, Chuck Roth, to acknowledge certain facts regarding Roth's terms of employment, to give up all interest in ADM Asia, Gemona and Swaffham and to "turnover [sic] to M. Ashton all documents, tapes, statements and evidence of any kind which he or Roth may ever have intended to use against [ADM, Ashton and Dale]." JA 2715.

ADM's records had to be changed because of recently discovered information, namely that the $417,532 paid to Gemona and Swaffham in December 1986, allegedly for marketing studies, was not deductible and that there were additional Korean revenue of $348,337 that had not previously been "booked." The accountants accordingly prepared ADM's 1986 tax return, which, pursuant to an extension, was not filed until September 15, 1987, to reflect this information. An amended return, filed in 1988, reduced the amount of the additional revenue to $311,643.

Second, on November 30, 1987, Dale and Ashton met with their personal accountant and told him they had received expense advances in 1986 that had not been included on their 1986 individual returns. After this meeting, Ashton filed an amended 1986 tax return dated December 2, 1987, adding to her taxable income $40,000 that she characterized as "travel advances not included in her 1986 W–2 wages." JA 2217–18. Dale decided against filing an amended return because he wanted to determine whether his extra $10,000 might be offset by amounts ADM owed him. He subsequently added the $10,000 to the taxable income reported in his 1987 tax return.[16]

Third, at some point, probably after August 21, 1987, Dale and Ashton signed a promissory note to repay ADM the $200,000 it had furnished to Arlington in August 1986. The payment to Arlington had initially been recorded as a loan from Guam National Bank and was later characterized by Dale as a loan from Asia Management Systems, Inc.[17] This note is now marked "paid 12/31/87."[18] JA 1979.

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[16] There is no apparent explanation in the record for the discrepancy between the amounts Ashton and Dale reported to the IRS, $40,000 and $10,000 respectively, and the amounts each received according to Bowers' testimony, $30,000 and $20,000 respectively. *See supra* pp. 5–6.

[17] August 21, 1987 is the date that appears on the note's face but it is unlikely that both Dale and Ashton signed it on that day since it appears Ashton was then in Korea and Dale was in Washington.

[18] A document from Dale's and Ashton's personal accountant's file indicates that as of February 29, 1988, the "Guam National Bank loan" was still outstanding and no payments had been made, although the next entry states: "Paid w/ $206,250 capital contribution from David M. Dale, $200,000 loan, $6250 interest." Trial

Fourth, at some point, apparently during summer 1988 after federal agents searched ADM's headquarters on June 16, 1988, Segal informed one of ADM's accountants that in December 1986 ADM had mistakenly paid $316,000 in consulting fees on behalf of ADM H&S and asked what should be done. The accountant then prepared an amended 1986 return, dated August 25, 1988, and signed by Ashton, eliminating the deduction previously taken for the December 1986 Bourbonia payment. In a memorandum to the accountant dated August 8, 1988, Segal explained that both that payment and the $102,655 payment in the following year "were paid in error by ADM, Inc." JA 2349. The memo further stated that "a loan will be set up in Michelle's and David's name to ADM, Inc. for the amounts sent to Bourbonia" and that "[i]nterest on the notes will accrue from the day the funds were disbursed from ADM, Inc." *Id.* Subsequently, four promissory notes were prepared, dated August 10, 1988, dividing the indebtedness between Dale and Ashton according to their respective ownership interests in ADM. Ashton and Dale each signed two of the notes and Segal witnessed all four. Each note is now marked "Paid 8/12/88." *See* JA 2034, 2035.

Finally, in March 1989, after additional government investigation and subpoenaing of documents, Segal told one of ADM's accountants that he had discovered a $500,000 accrual taken as a deduction in 1986 that had not been reversed when it later went unpaid. Accordingly, the accountant prepared an amended return, dated March 30, 1989, deleting the $500,000 deduction, and Segal signed it. The amended return explained its purpose as "[t]o adjust consulting expense for amounts accrued in 1986 but never paid subsequent December 31, 1986 [sic] and erroneously not reversed by Accounting Department." JA 2253.

Transcript 3073–75. The accountant testified that he had no personal knowledge of the repayment but had merely been informed of it by Dale.

D. Indictment and Trial

On January 11, 1990, an indictment was returned against ADM, Dale, Ashton, Sweeney and Segal, charging the following counts:

(1) Against all five defendants: conspiracy (in violation of 18 U.S.C. § 371) (a) to defraud the United States by impeding the IRS' assessment and collection of taxes and (b) to commit the following offenses against the United States: (i) tax evasion (26 U.S.C. § 7201), (ii) subscribing to a false return and aiding and abetting the preparation of a false return (26 U.S.C. §§ 7206(1) and 7206(2)) and (iii) false statements and concealing facts by trick, scheme and device from the IRS, the SBA and the DOD (18 U.S.C. § 1001); [19]

(2) Against Dale and ADM: subscribing to a false tax return (in violation of 26 U.S.C. § 7206(1)) (for signing the 1986 ADM tax return falsely deducting the $500,0000 debt to Swaffham and the $316,000 payment to Bourbonia);

(3) Against Ashton, Sweeney and Segal: aiding and assisting in the preparation and presentation of a false and fraudulent return (in violation of 26 U.S.C. § 7206(2)) (for actions related to ADM's 1986 return and its two fraudulent deductions);

(4) Against all five defendants: attempted tax evasion (in violation of 26 U.S.C. § 7201) and aiding and abetting (in violation of 18 U.S.C. § 2) (for actions related to the underreporting of taxable income on ADM's 1986 return);

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[19] Count 1 specifically identified as acts of the tax evasion conspiracy the following transactions: the deduction of the $417,532 Gemona payment, the $500,000 Swaffham accrual and the $316,000 and $102,655 Bourbonia payments, the failure to treat as income the $200,000 Arlington disbursement and the $50,000 payments to Dale and Ashton and the creation of phony explanations in amended returns for the initial treatment of the $500,000 accrual, the $316,-000 payment and the $50,000 payments.

(5) Against Dale, Ashton, Sweeney and ADM: wire fraud (in violation of 18 U.S.C. § 1343) and aiding and abetting (in violation of 18 U.S.C. § 2) (for causing the wire transfer of the $316,000 Bourbonia payment with intent to commit tax fraud);

(6) Against Ashton and ADM: concealing facts by trick, scheme and artifice (in violation of 18 U.S.C. § 1001) and aiding and abetting (in violation of 18 U.S.C. § 2) (for Ashton's nondisclosure of her relationship with Gemona or Swaffham in the DOD "Personnel Security Questionnaire");

(7) Against Dale and ADM: concealing facts by trick, scheme and artifice (in violation of 18 U.S.C. § 1001) and aiding and abetting (in violation of 18 U.S.C. § 2) (for the same nondisclosure in Dale's "Personnel Security Questionnaire");

(8) Against Ashton and ADM: concealing facts by trick, scheme and artifice (in violation of 18 U.S.C. § 1001) and aiding and abetting (in violation of 18 U.S.C. § 2) (for Ashton's nondisclosure of her Swaffham and Gemona interests in her February 1987 "Statement of Full Disclosure of All Foreign Connections");

(9) Against Dale and ADM: concealing facts by trick, scheme and artifice (in violation of 18 U.S.C. § 1001) and aiding and abetting (in violation of 18 U.S.C. § 2) (for Dale's identical nondisclosure); and

(10) Against Dale, Ashton and ADM: making false statements (in violation of 18 U.S.C. § 1001) and aiding and abetting (in violation of 18 U.S.C. § 2) (for denying the existence of interlocking directorships with foreign interests in the "Certificate Pertaining to Foreign Interests").

JA 141–74.

On July 23, 1990, after a lengthy trial, a jury returned a guilty verdict on each count against each defendant named therein. On July 15, 1991, the trial court sentenced Dale, Ashton, Segal and ADM. Dale was sentenced to 41 months' imprisonment on count 1, with concurrent 30 month sentences

on each of the other counts against him, 2 years' supervised release, a special assessment of $350 and a $675,000 fine and was assessed $58,037.96 for incarceration costs. Ashton was sentenced to 37 months' imprisonment on count 1, with concurrent 30 month sentences on each of the other counts against her, 2 years' supervised release and a $225,000 fine and was assessed $52,375.72 for incarceration costs. Segal was sentenced to 24 months' imprisonment on count 1, with concurrent sentences of 12 months on each of the other counts against him. ADM was assessed a $360,000 fine and a $450 special assessment. Sweeney's sentencing was delayed until August 13, 1991, when he was sentenced to concurrent prison terms of 18 months on counts 1, 3, 4 and 5, 2 years of supervised release and a $15,000 fine. The defendants challenge both their convictions and sentences and we address their various arguments below.

II. Sufficiency of the Evidence

Each defendant challenges the sufficiency of the evidence to support the convictions. The court's review here is a narrow one. First, as noted above, we must view the evidence in the light most favorable to the government, deferring to the jury's weight and credibility determinations. *United States v. Smith*, 964 F.2d 1221, 1223 (D.C. Cir. 1992); *United States v. Butler*, 924 F.2d 1124, 1126 (D.C. Cir.), *cert. denied*, 112 S. Ct. 205 (1991). In addition, the court must affirm each conviction if any rational trier of fact could have found the essential elements of the offense charged beyond a reasonable doubt. *United States v. Long*, 905 F.2d 1572, 1576 (D.C. Cir.), *cert. denied*, 111 S. Ct. 365 (1990). Applying these principles, we reject seriatim each defendant's sufficiency challenge.

A. Ashton

Defendant Ashton contends there was insufficient evidence to support her conviction on any of the counts on which she was convicted, namely counts 1, 3, 4, 5, 6, 8 and 10. For the

following reasons, we find the evidence sufficient to support her convictions on all seven counts.[20]

First, Ashton argues we must reverse her convictions on counts 6, 8 and 10, charging her with concealing facts from and making false statements to the federal government in violation of 18 U.S.C. § 1001[21] and those portions of count 1 alleging conspiracy to violate that section because the evidence was insufficient to establish either that her misstatements or nondisclosures on the DOD and SBA forms were made "knowingly and willfully," as required under the statute, or that they were material. We find neither contention persuasive.

Ashton's first challenge to her convictions on counts 6, 8 and 10 is that under a reasonable interpretation of the forms cited in those counts, her statements on them were literally true and complete. While Ashton's interpretation of the law regarding section 1001 appears consistent with the holdings in other circuits,[22] we nevertheless conclude her convictions

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[20] For the same reasons, we also reject ADM's sufficiency challenge which adopts Ashton's arguments by reference. *See* ADM Brief at 8.

[21] This section provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1001.

[22] *See, e.g., United States v. Gahagan*, 881 F.2d 1380 (6th Cir. 1989); *United States v. Race*, 632 F.2d 1114, 1120 (4th Cir. 1980); *United States v. Vesaas*, 586 F.2d 101, 104 (8th Cir. 1978); *United States v. Anderson*, 579 F.2d 455, 459–60 (8th Cir.), *cert. denied*, 439 U.S. 980 (1978); *United States v. Diogo*, 320 F.2d 898, 906–07 (2d Cir. 1963).

must be affirmed because her statements on those forms were not literally true under a reasonable interpretation of the forms.

Ashton first claims she could not be convicted under counts 6 and 8 because the expressions "foreign . . . business connections" in the "Personnel Security Questionnaire" (count 6) and "foreign connections" in the "Statement of Full Disclosure of All Foreign Connections" (count 8) can reasonably be interpreted to refer only to "actual status as an owner or director of a foreign company," and that she did not enjoy that status when she completed those forms because certain formalities required under Hong Kong law had not yet been satisfied.[23] We reject this claim summarily, finding Ashton's interpretation of "connections" far too restrictive. In its common usage, the word "connection" has a broad meaning[24] that certainly embraces Ashton's relationship to the two Hong Kong corporations of which she was by January 1987 indisputably both an owner and director, if not de jure at least de

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[23] Ashton asserts the record does not establish she was a legal owner or director of the two Hong Kong corporations before she signed the cited DOD forms because (1) corporate minutes indicate the transfer of ownership in the company was approved only "subject to stamping," meaning subject to stamping by the Stamp Duty Office in Hong Kong, and there is no evidence stamping occurred before the forms were completed in late January and early February 1987; (2) notices of change of directors for the two Hong Kong corporations were not filed with the Hong Kong Registrar of Companies until February 27, 1987; and (3) a letter dated March 12, 1987, from Edwards to a Hong Kong law firm noted that the firm "had never received new bank signature cards nor any documents effecting change of directors and transfer of shares" and stated: "If you could effect such changes and provide the bank with the appropriate signature cards I would be most appreciative." JA 2744.

[24] *See Webster's Third New International Dictionary* 481 (1981) (defining "connection" as "the state of being connected or linked" and as "a social, professional, or commercial relationship in a practical or active way").

facto.[25] Because Ashton's proffered construction of the forms' language was unreasonable, we reject her challenge to her convictions on counts 6 and 8.[26]

We similarly reject Ashton's challenge to count 10. Ashton contends her denial on the 1987 "Certificate Pertaining to Foreign Interests" that ADM had "interlocking directors with foreign interests" was literally true because foreign interests can reasonably be construed to exclude foreign corporations owned by American citizens. We disagree. A "foreign corporation" is clearly a "foreign interest" regardless of ownership, as Ashton herself acknowledged when, on the "Statement of Full Disclosure of all Foreign Connections," she identified herself as a "Representative of a Foreign Interest" based on her interest in ADM H&S.

Ashton also asserts the count 10 conviction must be reversed because the misrepresentation alleged in that count, the denial of any "foreign interests" in the January 1987 "Certificate Pertaining to Foreign Interests," was not material. Ashton reasons that, because the interlocking directorships between ADM and ADM H&S were discoverable from the February 1987 "Statement of Full Disclosure of All Foreign Connections," in which she identified ADM H&S as a foreign interest in which she, Dale and Sweeney were directors, it could not have influenced or been material to the DOD. We find this argument also unavailing. Admittedly, in order to give rise to criminal liability under section 1001, a

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[25] The Gemona and Swaffham corporate minutes of meetings conducted October 21, 1986 note that Dale, Ashton and Bowers were "appointed as Directors ... with immediate effect." JA 2106, 2127. In addition, Ashton signed a notice that she "consented to act as Director" of each corporation "as from October 21, 1986," JA 2109, 2129, and in fact attended a shareholder's meeting for each on November 2, 1986, the minutes of which reflect that a "shareholder vote" "did unanimously resolve" to increase the outstanding shares in each corporation to 100: 37.5 for Dale, 37.5 for Ashton and 25 for Bowers. JA 2131, 2110.

[26] Our disposition here applies equally to Dale's adoption by reference of the same argument to challenge his conviction on count 9. *See* Dale Brief at 1.

concealment or affirmative misrepresentation must be material. *United States v. Hansen*, 772 F.2d 940, 949 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1045 (1986). Nevertheless, even assuming that the earlier disclosure of ADM's relationship with ADM H&S rendered nondisclosure of that relationship here immaterial, it does not affect Ashton's liability for failing to disclose the interlocking directorships with Swaffham and Gemona which had not been otherwise disclosed to the DOD and therefore were material.[27]

Ashton's final sufficiency challenge is that the trial evidence failed to establish that she "willfully" participated in the fraudulent tax deductions alleged in counts 3 and 4, as required under 26 U.S.C. §§ 7206(2)[28] and

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[27] In light of this disposition, we need not decide whether, as other circuits have held, it is a misrepresentation's potential to influence, irrespective of the recipient's knowledge *vel non* of its falsity, that determines materiality under section 1001. *See United States v. Whitaker*, 848 F.2d 914, 916 (8th Cir. 1988); *United States v. Goldfine*, 538 F.2d 815, 8820–21 (9th Cir. 1976). We note in this regard, however, that this Circuit has consistently held:

> The test of materiality is whether the statement "has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a [particular] determination." Proof of actual reliance on the statement is not required; the Government need only make a reasonable showing of its potential effects.

Hansen, 772 F.2d at 949 (quoting *United States v. Diggs*, 613 F.2d 988, 999 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 982 (1980)), *cert. denied*, 475 U.S. 1045 (1986); see also *Weinstock v. United States*, 231 F.2d 699, 701–02 (D.C. Cir. 1956).

[28] This subsection provides in part:

> Any person who—
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> . . .
>
> Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is

7201,[29] or that she had a "conscious knowing intent to defraud" in connection with the wire transfer of funds to Bourbonia alleged in count 5, as required under 18 U.S.C. § 1343, the wire fraud statute.[30] All three of the challenged counts alleged fraud in connection with ADM's claimed 1986 deductions of the $500,000 Swaffham accrual and the $316,000 Bourbonia payment. Ashton argues there was no evidence that she was aware the Bourbonia payment was not

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false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; . . .

. . .

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

26 U.S.C. § 7206(2).

[29] This section provides:

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

26 U.S.C. § 7201.

[30] This statute provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1343.

deductible or that the Swaffham payment was ever made, much less that it was not deductible. We disagree, finding ample evidence to support a finding of the requisite intent.

The evidence against Ashton here is similar in nature and weight to the evidence in *United States v. Treadwell*, 760 F.2d 327 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 1064 (1986), in which this court affirmed the conviction of Treadwell, a real estate firm's chief executive officer, for conspiring with subordinates to violate federal law even though Treadwell exercised little control over day-to-day operations and claimed to have reimbursed the project and fired one of her subordinates after she learned of the misconduct. The *Treadwell* court upheld the conviction based on the following circumstantial evidence:[31] (1) Treadwell's close personal and business relationships with the malfeasant subordinates, (2) her regular meetings with them, (3) her extensive experience "as a government-grant entrepreneur" and (4) her attempt to conceal the misconduct by altering and destroying documents. *Id.* at 333–35. The court concluded: "Combining these factors with the sheer magnitude of the [illegal acts], many involving other businesses that she controlled, would fully support a reasonable inference that Treadwell knew of and condoned her subordinates' malfeasance." *Id.* at 335. Similar evidence here, when viewed most favorably to the government, supports Ashton's conviction.

The record yields the following facts to support the finding that Ashton willingly participated in the frauds alleged: (1) she was the majority shareholder in all of the corporations; (2) she took an active role in the corporations, signing authorizations and travelling to the foreign offices; (3) the frauds conferred a financial benefit on ADM, Swaffham and ADM H&S, in which she owned controlling interests, as well as on her personal Bourbonia investment account; (4) these transactions were part of a much larger scheme to defraud the

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[31] The court noted that "[i]n determining whether the government has met its burden of proof, ... no legal distinction may be drawn between direct and circumstantial evidence." 760 F.2d at 333 (citing *United States v. Davis*, 562 F.2d 681, 684 (D.C. Cir. 1977)).

government, which included Ashton's personal withdrawals of ADM funds which she failed to report as income and misrepresentations to government agencies; (5) one of her other misrepresentations was the concealment of the existence of Swaffham, one of the corporations benefited by the frauds; and (6) she personally assisted in covering up many of the frauds, including the $316,000 Bourbonia deduction.[32] As in *Treadwell*, the combination of these facts suffices to support the jury's finding that Ashton willfully and intentionally participated in the frauds alleged.

B. Sweeney

Sweeney challenges the sufficiency of the evidence to support his conviction on counts 1, 3, 4 and 5, advancing two arguments: (1) the evidence did not establish that the payments to Bourbonia, or their tax treatment, were fraudulent and (2) assuming there was fraud, the evidence did not support a finding of specific intent on his part to evade taxes. We find neither argument persuasive and conclude the evidence is sufficient to support Sweeney's conviction on all four counts.

Sweeney first asserts there was insufficient evidence to establish that the invoices to Bourbonia were in fact fraudulent. We find, however, that the record contains substantial evidence that the invoices were issued for the express purpose of diverting tax-free funds for the benefit of Ashton, Dale and ADM H&S, while conferring a tax benefit on ADM, and that the services identified in them were never intended to be performed.[33]

First, although the December 1986 invoices purported to charge for "Product Development Consulting for the period March 86, to December 86" and "for Services rendered in

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[32] She signed the August 25, 1988, amended 1986 return which gave a phony explanation of why the $316,000 payment had been deducted.

[33] This conclusion also disposes of Dale's adoption by reference of the same challenge to his convictions. *See* Dale Brief at 1.

accordance with the letter contract as of March 11, 1986 for Machine Language Translation Research and Development Project," JA 1984–85, Knight, who had been a consultant to ADM since February 1986, who had frequently spoken by phone with Wormer during that time, who was the only employee of ADM H&S as of December 1986, and who was meeting with Sweeney and Wormer the entire day of December 11, 1986, the date on the invoices, nevertheless "had no knowledge" that as of December 1986 Wormer had performed $316,000 worth of work for ADM H&S or that ADM had entered any contract with Bourbonia. In addition, despite government subpoenas, no contract with Bourbonia has ever been produced and Crystal Day, ADM's "Director of Contracts," testified that despite a thorough search she was unable to find such a contract and was in fact informed by Sweeney that none existed. Nor was Day able to discover any actual reports from either year, although the 1987 invoices expressly stated that "specific reports were produced or are now underway." Trial Transcript (Tr.) 2573. In fact, Day herself testified she never heard of Bourbonia before December 1988, although she attended weekly meetings with Ashton, Dale and "mid-level management." Further, despite Sweeney's assertion in a February 19, 1988, memorandum that Bourbonia "provides invaluable services to me on virtually a day-to-day basis," JA 1994, three witnesses who worked in ADM's German office between 1986 and 1987, namely Lyddi Hudson, Yvonne Burr and Sally Frank, testified they were unaware of any consultation arrangement with Bourbonia, or any Swiss firm, even though Burr had been with the German office since its establishment and the other two women had attended weekly meetings with Sweeney and the other "key players." Finally, after the federal investigation began, ADM took steps to reverse the initial tax treatment of the $316,000 and $102,655 Bourbonia payments as deductible expenses and Dale and Ashton assumed personal responsibility for repaying both amounts to ADM, signing promissory

notes and, according to notations on those notes, paying them off.[34]

Sweeney next asserts that even if the invoices were fraudulent, there is no evidence that he personally knew the fraud was committed for the purpose of tax evasion. In support of his argument, Sweeney relies heavily on the Ninth Circuit's opinion in *United States v. Salerno*, 902 F.2d 1429 (9th Cir. 1990). We find the reasoning in *Salerno* inapplicable here.

In *Salerno* the Ninth Circuit reversed the tax evasion conviction of a former casino manager and his assistant who had embezzled money from the casino through a scheme that made it appear that the missing money had been won by customers, thereby entitling the casino to deduct the stolen amounts on its tax returns. The *Salerno* court properly found the evidence insufficient because it failed to show the two defendants embezzled the money "not merely for their own benefit but with a specific intent to cause the casino to file false tax returns." *Id.* at 1432. In so finding, the court explained:

> The government at trial identified no persons other than [the defendants], the cashier and the runner as being involved in the scheme. None of the four individuals was an officer, shareholder, or director of the taxpayer corporation. There was no evidence that any of those individuals had anything to do with the preparation of [the corporation's] tax returns. There was no evidence linking the embezzlement scheme to any officer, director or shareholder of the taxpayer corporation. There was no evidence that the defendants had any motive for conducting a scheme to defraud the government, or that they

[34] The government also urges strongly that the alleged consultation work performed in 1986 is inconsistent with Knight's testimony that to the best of his knowledge Sweeney first met Wormer on December 10, 1986, when Sweeney and Knight drove together to Wormer's home. What Knight actually said, however, is that as far as he knew that was the first occasion Sweeney and Wormer "physically met," suggesting they had had previous contact by telephone or otherwise. *See* JA 1130.

> ever mentioned their own taxes, much less the tax returns of the casino.

Id. at 1432. In fact, the court concluded: "In this case the filing of the corporate return appears irrelevant to the defendant's conduct." *Id.* at 1433. Not so here. Sweeney was a corporate vice-president who, according to the evidence, may have been promised an equity position. Further, the fraud, as alleged, involved a conspiracy among Sweeney and both principals of the corporation and its only apparent purpose was to obtain unwarranted favorable tax treatment through untaxed disbursements to Ashton, Dale and ADM H&S and unjustified deductions for ADM. Sweeney was certainly in a position to be aware of such a motive and the jury could reasonably have so inferred. Accordingly, we find the evidence, taken as a whole, sufficient to support a finding of specific intent by Sweeney to evade tax liability on ADM's behalf.

C. Segal

Finally, Segal challenges the sufficiency of the evidence to support his conviction on counts 1, 3 and 4 and, in addition, challenges the trial court's denial of his motion for a new trial. We reject both challenges, addressing each separately.

First, Segal contends his convictions should be reversed because the evidence was insufficient to establish beyond a reasonable doubt that he *knowingly* participated in any of the fraudulent activity, asserting he was merely an innocent employee performing the accounting responsibilities his job required. We conclude, however, that the evidence, viewed most favorably to the government, reveals the following facts sufficient to support a finding of knowing participation in the tax frauds: (1) Segal was ADM's Chief Financial Officer and as such reported directly to Ashton and Dale and attended high-level company meetings with them around the world; (2) Segal failed to disclose to Grant Thornton, ADM's outside accounting firm, that the suspect transactions with ADM Asia, Gemona, Swaffham and ADM H&S were related-party transactions—in fact, he signed a letter to Grant Thornton, dated May 27, 1987, stating, *inter alia*, that "[r]elated party transactions and related amounts receivable or payable, in-

cluding sales, purchases, loans, transfers, leasing arrangements and guarantees" had been "properly recorded or disclosed in the financial statements," JA 2298, while as of that date the $200,000 Arlington payment, the $417,532 payments to Swaffham and Gemona and the $500,000 Swaffham accrual had already occurred but not been identified as related-party transactions;[35] (3) Segal knew or should have known that the amount of the $500,000 Swaffham invoice was artificial and that the invoice itself was not bona fide;[36] (4) it was Segal whom Ashton selected to accompany her to Korea in August 1987 and to negotiate with Bowers, even though it was likely, if not inevitable, that the negotiations would involve discussion of some of the fraudulent activities, as in fact they did;[37]

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[35] According to a Grant Thornton accountant, when asked why the related party transactions had not been disclosed, Segal responded "No one asked me." JA 1542.

[36] Segal wrote Bowers a letter dated March 5, 1987, stating that "a bill is needed for the consulting work that David Dale requested. My understanding is that the work was performed last year for a total cost of approximately $150,000. The consultant's report is also needed as backup to the bill." JA 2055. When Bowers subsequently received an invoice for $149,000 in mid-March, he made a call to Dale which he recorded. During that conversation Bowers reminded Dale of a previous agreement regarding the invoice amount: "We agreed for 750, and then we were to back ... back it down to 500. Remember, I was to prepare some paper work, two or three exchanges, and, uh, it was to be backed down to 500." JA 2387. Later in the conversation, Dale remarked "I don't know whether Marty can handle seven hundred and fifty thousand," JA 2389, and that they would "have to find out what Marty thinks we can get away with," JA 2391. The actual $500,000 invoice arrived at ADM a week later, back-dated to December 30, 1986. Segal informed Grant Thornton of the amount sometime before March 15, 1987.

[37] During the negotiations, Ashton and Bowers attempted to persuade Bowers to sign a document agreeing to hand over the incriminating recordings and acknowledging that the $200,000 payment to Arlington had been "formally loaned" by ADM Asia. *See* JA 2714–15. In addition, handwritten notes made by Segal while in Korea reveal his knowledge of the tapes and Ashton's desire to

(5) after the Korean sojourn, Segal continued to conceal from Grant Thornton some of the fraudulent tax transactions of which he must have known by then;[38] and (6) in 1988 Segal furnished ADM's accountants a false explanation of why the 1986 tax return had to be amended to eliminate the deduction of the $316,000 Bourbonia payment.[39] Accordingly, we reject Segal's first sufficiency challenge.

Next, Segal asserts that even if the evidence was sufficient to support his conviction, the district court nevertheless erred in denying his motion for a new trial on the grounds that the verdict was against the weight of the evidence and that newly discovered evidence, namely testimony given by Sweeney after trial but before sentencing, established Segal's innocence.[40] A motion for new trial on either of the grounds asserted is committed to the trial court's sound discretion and may be reversed only for abuse of that discretion. *See United States v. Rogers*, 918 F.2d 207, 213 (D.C. Cir. 1990); *United States v. Sensi*, 879 F.2d 888, 901 (D.C. Cir. 1989). We conclude there was no abuse of discretion here.

First, we find no error in the district court's denial of the motion insofar as it was based on the weight of the evidence. In considering a new trial motion based on the weight of the evidence the district judge "weighs the evidence and evaluates the witnesses' credibility and decides whether 'a serious

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obtain them and expressly indicate that "money was laundered" through the Korean office. JA 2058.

[38] He said nothing at that time about the $200,000 Arlington payment or the $500,000 Swaffham accrual.

[39] The accountant testified that "the substance" of Segal's explanation was that "some bills had been paid by ADM U.S.... and that the expenses were really incurred by a related corporation, ADM GmbH," referring to ADM H&S. Tr. 3176. In fact, the invoices were unrelated to ADM H&S.

[40] At a hearing conducted February 22, 1991, Sweeney, pursuant to an agreement with the government, provided extensive sentencing testimony regarding ADM's business activities, some of which suggested Segal may not have been directly involved in ADM's fraudulent conduct.

miscarriage of justice may have occurred.'" *Rogers*, 918 F.2d at 213 (quoting *Tibbs v. Florida*, 457 U.S. 31, 38 n.11 (1982)). Our review of the district court's decision is particularly narrow when the court denies the new trial motion because the court's decision accords with the jury's. *Hutchinson v. Stuckey*, 952 F.2d 1418, 1420 (D.C. Cir. 1992) (citing *McNeal v. Hi-Lo Powered Scaffolding, Inc.*, 836 F.2d 637, 646 (D.C. Cir. 1988)). Given this limited scope of review and the evidence set out above supporting Segal's knowing participation in the tax evasion scheme, the trial court's rejection of Segal's weight of the evidence argument cannot be characterized as an abuse of discretion and must therefore be upheld. *See United States v. Kelly*, 748 F.2d 691, 701 (D.C. Cir. 1984) (holding that, as long as the weight of the evidence clearly weighs in favor of conviction, not against it, there is no abuse of discretion in denying a new trial motion).[41]

Nor do we find error in the judge's refusal to grant a new trial based on Sweeney's post-trial testimony. To obtain a

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[41] Segal maintains that comments made by the trial judge at sentencing indicate he applied the wrong standard, deferring entirely to the jury's judgment and abdicating his responsibility to review the evidence himself. The challenged language states:

> [I]n looking at the verdict of the jury, the court cannot sit back and say to the jury, "I disagree." Whether I disagreed with their verdict in your case, and I'm not going to tell you whether I did or did not, but whether I disagreed with the jury verdict in your case is of no moment. That isn't a basis for setting aside the verdict or giving you a new trial. There are standards that the court must follow, and with respect to the evidence, as long as the evidence has been presented to the jury in a fair manner and under fair and correct instructions, *and as long as the court has decided and concluded that the jury has considered those matters*, it's a verdict for the jury to decide, it's not for the court.

JA 1825–26 (emphasis added). The highlighted language satisfies us that the judge properly assessed the jury's verdict in light of the credible evidence and the weight one could reasonably ascribe to it.

new trial based on newly discovered evidence, a convicted defendant must offer evidence that " 'ha[s] been discovered since the trial.' " *Sensi*, 879 F.2d at 901 (quoting *United States v. Mangieri*, 694 F.2d 1270, 1284 (D.C. Cir. 1982)). The unanimous view of circuits that have considered the question is that this requirement is not met simply by offering the post-trial testimony of a co-conspirator who refused to testify at trial. *See United States v. Reyes-Alvarado*, 963 F.2d 1184, 1188 (9th Cir. 1992) (" '[W]hen a defendant who has chosen not to testify comes forward to offer testimony exculpating a codefendant, the evidence is not "newly discovered." ' ") (quoting *United States v. Diggs*, 649 F.2d 731, 740 (9th Cir.), *cert. denied*, 454 U.S. 970 (1981)); *United States v. Gustafson*, 728 F.2d 1078, 1084 (8th Cir.) (finding no abuse of discretion in denying new trial motion based on probability that post-trial testimony of convicted co-defendants, who had agreed to provide government with information in return for lenient sentence, would deviate from their trial testimony and no longer implicate defendant-appellant), *cert. denied*, 469 U.S. 1189 (1984); *United States v. Metz*, 652 F.2d 478, 480 (5th Cir. Unit A Aug. 3, 1981) (rejecting contention that " 'newly available' evidence is synonymous with 'newly discovered' evidence" and finding no abuse of discretion in denial of new trial motion based on co-defendant's post-conviction exculpating affidavits); *United States v. Jacobs*, 475 F.2d 270, 286 n.33 (2d Cir.) ("[W]e fully agree with the judge's alternative ground [for denying a new trial motion], that a court must exercise great caution in considering evidence to be 'newly discovered' when it existed all along and was unavailable only because a co-defendant, since convicted, had availed himself of his privilege not to testify."), *cert. denied*, 414 U.S. 821 (1973). We recently acknowledged this principle in the administrative context to hold that the National Transportation Safety Board had reasonably concluded the proffered testimony of an FAA inspector who had invoked his fifth amendment privilege at a pilot certification hearing but had since pleaded guilty to charges related to the hearing's subject-matter did not constitute "newly discovered" evidence under an NTSB rule so as to warrant reconsideration of the

certification denial. *See Chirino v. NTSB*, 849 F.2d 1525 (D.C. Cir. 1988).[42] In light of our holding in *Chirino* and the holdings of the other circuits in the cited cases, we conclude it was not an abuse of discretion to deny a new trial based on Sweeney's post-trial testimony.

III. Admission of Tapes

A. Title III

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq.*, provides, in relevant part, that a person may intercept wire, oral or electronic communications to which the person is a party "unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State." 18 U.S.C. § 2511(2)(d). In their motion to suppress the tape recordings made by Bowers and Roth, the defendants argued that the taping violated Title III because the purpose for taping was to blackmail Dale and Ashton for stock and money. The government responded with three independent arguments: (1) Title III does not apply extraterritorially and therefore is inapplicable to Bowers' taping in Korea of phone calls to and from the United States; (2) even if Title III applies extrater-

[42] In *Chirino*, this court stated:

> To assess the reasonableness of [the NTSB's] interpretation, we pause to observe that, in an admittedly different but analogous context, cases construing Rule 33 of the Federal Rules of Criminal Procedure governing new trials are instructive on the question of what constitutes "newly discovered" evidence. In the Rule 33 setting, several courts have concluded that post-trial testimony of a co-defendant who initially asserted his or her Fifth Amendment privilege does not constitute "newly discovered" evidence within the meaning of the Rule....
>
> These decisions from the criminal law setting provide a direct analogy to the situation before the Board in this case.

849 F.2d at 1532 (citations to *Metz*, *Diggs* and *Jacobs* omitted).

ritorially and Bowers and Roth made the tapes for an illegal purpose, Title III does not mandate suppression where the government is the innocent recipient of tapes made by unindicted co-conspirators in the course of criminal activity; and (3) the defendants failed to meet their burden of proving that Bowers' or Roth's primary purpose in taping was either criminal or tortious. The district court did not state explicitly why it denied the motion to suppress, explaining only that it had conducted a three-day evidentiary hearing and that "[a]fter careful consideration of the motion, the opposition thereto and the entire record in this case," the motion should be denied. JA 917. The defendants did not object to the district court's failure to state its essential findings of fact on the record. *See* Fed. R. Crim. P. 12(e).

On appeal, the defendants and the government repeated the same arguments regarding suppression of the tapes that they made to the district court. Normally, where the district court denies a motion to suppress but fails to make findings of fact on the record, we may sustain the district court's decision "if there is any reasonable view of the evidence that will support it." *Scarbeck v. United States*, 317 F.2d 546, 562 (D.C. Cir. 1962), *cert. denied*, 374 U.S. 856 (1963); *see also United States v. Mitchell*, 951 F.2d 1291, 1299 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1976 (1992); *United States v. Caballero*, 936 F.2d 1292, 1296 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 943 (1992); *United States v. Allen*, 629 F.2d 51, 57 (D.C. Cir. 1980). However, we declined to exercise this option here because we did not know which of three separate legal theories advanced by the government the district court had adopted and what facts, if any, it relied on to support its chosen theory.

By order dated January 8, 1993, we remanded the record to the district court for a clarification of its reasons for admitting the tapes and any relevant factual findings made in support of its admissibility ruling. *See United States v. Williams*, 951 F.2d 1287, 1290–91 (D.C. Cir. 1991) (remand to the district court is appropriate where neither the legal reasoning nor factual findings supporting the denial of a motion to suppress are apparent because it is not clear "[o]ne,

that the district court asked the right legal questions in making its ruling; two, that it actually weighed the evidence bearing on the facts needed to answer them"). On January 21, 1993, the district court responded with an order explaining that a memorandum had been prepared subsequent to the court's denial of the defendants' motion to suppress the tapes, but while "[i]t was the Court's understanding that the Memorandum had been filed; it now appears that the Memorandum was not filed. The Memorandum sets forth the reasons the Court . . . denied the motion to suppress tapes. . . . [A] copy of the Memorandum has been signed and is attached as Court Exhibit A." *United States v. Dale*, Crim. No. 90–0027, Memorandum Order at 1–2 (D.D.C. Jan. 21, 1993).

In the memorandum, which was filed and made a part of the record, the district court expressly eschewed the first two legal theories pressed by the government, that Title III does not apply extraterritorially or that it does not apply to the government's innocent receipt of recordings made by a co-conspirator, stating that "[f]or the purpose of this motion, the Court will assume without deciding that Title III applies to all of the tape recordings at issue." *United States v. Dale*, Crim. No. 90–0027, Memorandum at 2 n.1 (D.D.C. Jan. 21, 1993) ("Tapes Memorandum"). Instead, the court found that the evidence supported the government's third theory and concluded that the "defendants have failed to establish that the motivation for the taping by either Bowers or Roth was criminal or tortious." *Id.* at 3. The district court explained that although Bowers

> was a willing participant in the illegality in the beginning, there came a time when he became an unwilling participant because he felt that there was a possibility that all of the responsibility for these activities could be placed on him. Bowers stated that he began taping conversations with the defendants at about this time in order to make sure his interests were protected. Specifically, Bowers asserted that with the taping he wanted to make a record which detailed the participation of defendants Ashton and Dale in the criminal activities taking place in

> Asia and show[ed] that he was receiving directions [from them] as to those activities. It was important to him that it was clear on the recordings that he was not acting alone since he feared that defendants would seek to portray him in that light.

Id. at 5–6. The district court credited this testimony and found that the defendants had not rebutted Bowers' explanation for the taping. *Id.* Similarly, the district court found Roth's explanation that he made the tapes to keep a record of his employment dispute with ADM and not for purposes of extortion to be "entirely credible." *Id.* at 4. We permitted the parties to file supplemental briefs addressing these findings, and after reviewing those briefs and the district court's memorandum, we conclude that the district court's factual findings were not clearly erroneous.

The burden was on the defendants to prove that Bowers and Roth made the tapes for criminal or tortious purposes, *see Traficant v. Commissioner*, 884 F.2d 258, 266 (6th Cir. 1989); *United States v. Phillips*, 540 F.2d 319, 326 (8th Cir.), *cert. denied*, 429 U.S. 1000 (1976), and the evidence supports the district court's conclusion that the defendants failed to meet their burden. In their supplemental brief, the defendants contend that because the district court failed to mention every bit of evidence allegedly probative of Bowers' and Roth's intent, the court necessarily overlooked or ignored this evidence. However, the district court was obligated to state only its essential findings on the record, *see* Fed. R. Crim. P. 12(e), and we do not find that the district court neglected to consider any dispositive evidence in the record. Indeed, the district court noted that "the evidence presented by defendants to support their claim that Roth conspired with Bowers in a blackmail and extortion plan is scant and unpersuasive," and further that it "was not persuaded by defendants' efforts to rebut Bowers' testimony." Tapes Memorandum at 4, 6. In any event, simply because the factual record could reasonably lead a factfinder to conclude that Bowers and Roth did have an illegal or tortious purpose in taping does not mean that the district court's contrary, and at least equally permis-

sible, view of the facts is clearly erroneous. *See Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985).

Neither do we find that the district court erred in its legal analysis. Taping phone calls to make an accurate record of a conversation "in order to prevent future distortions by a participant" is not illegal, *see United States v. Underhill*, 813 F.2d 105, 110 (6th Cir.), *cert. denied*, 482 U.S. 906 (1987), even when the recording is made in the hopes of producing evidence of an illegal conspiracy, *see By-Prod. Corp. v. Armen-Berry Co.*, 668 F.2d 956, 959–60 (7th Cir. 1982). A person may even tape confederates in the hope of obtaining evidence to reduce his own sentence. *See United States v. Ruppel*, 666 F.2d 261, 271 (5th Cir. Unit A), *cert. denied*, 458 U.S. 1107 (1982). Given the district court's determination that Bowers' purpose for taping was to protect himself and Roth's purpose was to establish a record of his employment dispute, it would appear that the district court correctly concluded that the tape recordings were not made in violation of Title III. The defendants argue, however, that the district court "may well have applied an erroneous legal standard" by concluding that Title III is not violated where the primary purpose for taping is legal, even though a second, unlawful factor also motivated the taper. Appellants' Joint Supplemental Brief at 6–7.

The defendants are correct that a violation of Title III is established when "it is shown either (1) that the primary motivation, or (2) that a determinative factor in the actor's motivation for intercepting the conversation was to commit a criminal, tortious, or other injurious act." *See United States v. Vest*, 639 F. Supp. 899, 904 (D. Mass. 1986), *aff'd*, 813 F.2d 477 (1st Cir. 1987), *cert. denied*, 488 U.S. 965 (1988).[43] Al-

[43] In *Vest*, the court rejected the defendant's position that suppression is appropriate under Title III if any part of the motivation is criminal or tortious, explaining:

> It is characteristic of human experience that individuals usually—perhaps even always—act with mixed motives. To adopt the interpretation of the statute advanced by the defendant would impose on the government the nearly insurmountable

though the district court at one point in the memorandum referred to Roth's "primary" purpose for taping, Tapes Memorandum at 3, it is clear to us that the district court, which cited *Vest*, recognized that the defendants were obligated to demonstrate only that some determinative factor in the taping was impermissible. Unfortunately for the defendants, there is no indication that the district court found *any* of the purposes motivating Bowers and Roth to be illegal. Instead, the court quite clearly stated that "defendants have failed to sustain their burden of proving that Roth acted with an impermissible purpose," and that "defendants' argument that Bowers' motivation behind his taping was illegal or tortious is unconvincing." *Id.* at 5–6. In sum, the district court correctly applied the appropriate legal standard in refusing to suppress the tapes.

B. Authentication

The defendants next argue that the district court erred by failing to make an explicit threshold determination that the tapes were trustworthy, especially in light of a defense expert's report concluding there was a possibility that some tapes had been altered or recorded over. The admission of recordings into evidence is committed to the sound discretion of the trial court, so long as the tapes are authentic, accurate and trustworthy. *See United States v. Sandoval*, 709 F.2d 1553, 1554 (D.C. Cir. 1983); *United States v. Slade*, 627 F.2d 293, 301 (D.C. Cir.), *cert. denied*, 449 U.S. 1034 (1980); *United States v. Haldeman*, 559 F.2d 31, 107 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977). It was not an abuse of discretion for the district court to admit the tapes into evidence without expressly stating that the tapes were reliable because the record indicates that the court accepted the government's proffer of trustworthiness and rejected the defendants' concerns. We believe that in admitting the tapes into evidence, the district court implicitly found that " 'the

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burden of eliminating the possibility that an improper motive played any part in the decision to intercept the communication.

639 F. Supp. at 904.

possibilities of misidentification and adulteration [were] eliminated, not absolutely, but as a matter of reasonable probability.'" *Haldeman*, 559 F.2d at 107 (quoting *Gass v. United States*, 416 F.2d 767, 770 (D.C. Cir. 1969)).

To meet its burden of demonstrating the authenticity and accuracy of the tapes, *see United States v. King*, 587 F.2d 956, 961 (9th Cir. 1978), the government first produced IRS Special Agent Kenneth Buck who testified and was cross-examined at length regarding the tapes and in particular, about how the government had inadvertently damaged one part of one tape. Next, Bowers described the mechanism by which he taped telephone conversations, explained the circumstances under which he handed tapes over to government agents and testified that the tapes were fair and accurate recordings of conversations to which he was a party. In addition, the court engaged in a lengthy colloquy with counsel on the accuracy and reliability of the tapes, and the findings of the defense expert regarding potential tampering with the tapes. Finally, the district court gave the defendants the option of having the FBI technician who produced noise-reduced versions of the tapes testify regarding whether the tapes might have been tampered with prior to receipt by the FBI, which offer the defendants declined. Only after all of the foregoing did the district court admit the tapes into evidence and allow them to be played to the jury.

There is no single rigid standard for determining whether a tape recording may be admitted into evidence. *See United States v. Lance*, 853 F.2d 1177, 1181 (5th Cir. 1988) (federal courts do not require "conclusive proof of authenticity" before admitting tapes); *Haldeman*, 559 F.2d at 107 (evidence of admissibility of tapes "need not conform to any particular model"). Tapes may be authenticated by testimony describing the process or system that created the tape, *see United States v. Sivils*, 960 F.2d 587, 597 (6th Cir.), *cert. denied*, 113 S. Ct. 130 (1992); *Haldeman*, 559 F.2d at 107–09, or by testimony from parties to the conversation affirming that the tape contained an accurate record of what was said. *See Lance*, 853 F.2d at 1181–82; *Sandoval*, 709 F.2d at 1555. The district court's decision to admit the tapes was obviously

based on its conclusion that the testimony of both the originator of *the tapes and of the IRS agent established the* authenticity, accuracy and trustworthiness of the tapes notwithstanding the misgivings of the defendants' expert. Given the extended discussion of the objections and the government's evidence in court, we are satisfied that the district court committed no reversible error in failing to make the basis of its ruling explicit.

IV. Admission of Evidence from Search

On May 18, 1990, the district court denied, without elaboration, the defendants' motion to suppress evidence seized in a search of ADM's offices and warehouse. In responding to our January 8, 1993 request to set forth its reasons for denying the defendants' motion to suppress the tapes made by Bowers and Roth, the district court has provided this court with a second memorandum, also mistakenly believed by the district court to have been filed in 1990, explaining in detail why the court refused to suppress evidence seized in the search of ADM's offices. *United States v. Dale*, Crim. No. 90–0027, Memorandum Order (D.D.C. Jan. 21, 1993) ("Warehouse Memorandum"). In their supplemental briefs, the parties have addressed the search and suppression issues in light of the district court's memorandum.

A. Franks *Hearing*

The defendants argue that the trial court erred in refusing to hold an evidentiary hearing under *Franks v. Delaware*, 438 U.S. 154 (1978), to investigate alleged defects in the affidavit of Defense Criminal Investigation Service Special Agent Heidi Shintani supporting the warrant to search ADM's offices and warehouse in Washington, D.C. Although a search warrant is presumptively valid, if the defendant is able to make

> a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary

> to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.

Id. at 155–56; *see United States v. Sobamowo*, 892 F.2d 90, 94 (D.C. Cir. 1989), *cert. denied*, 111 S. Ct. 78 (1990). The defendants contend that they made such a showing before the district court by proffering evidence that: allegations in the warrant that ADM illegally substituted products in executing contracts with the Army were false and the affiant Shintani acted with reckless disregard for the truth by failing to investigate the validity of the allegations; the affiant misrepresented the credibility of David Bowers by failing to disclose that Bowers was himself under investigation; and the affiant lied about information provided by former ADM employees. We conclude that the district court properly rejected each of these claims.[44]

First, the defendants produced affidavits from Army officials to establish that ADM had approval from the Army to

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[44] The circuits are split on the question whether a district court's decision not to hold a *Franks* hearing is reviewed under the clearly erroneous or *de novo* standard of review. Four circuits adhere to the clearly erroneous standard. *See United States v. Buchanan*, 1993 WL 34834 at *6 (8th Cir. Feb. 16, 1993); *United States v. Skinner*, 972 F.2d 171, 177 (7th Cir. 1992); *United States v. Hadfield*, 918 F.2d 987, 992 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 2062 (1991); *United States v. One Parcel of Property*, 897 F.2d 97, 100 (2d Cir. 1990). Two review such decisions *de novo*. *See United States v. Homick*, 964 F.2d 899, 904 (9th Cir. 1992); *United States v. Mueller*, 902 F.2d 336, 341 (5th Cir. 1990). We have not definitively resolved the issue in this circuit. In *United States v. Richardson*, 861 F.2d 291, 293 (D.C. Cir. 1988), *cert. denied*, 489 U.S. 1058 (1989), we invoked the clearly erroneous standard to review a district court's finding on the good faith belief of the police officer in executing the disputed affidavit but we did not explicitly discuss which standard would apply to the ultimate decision not to hold a *Franks* hearing. For purposes of this case, we need not resolve the precise scope of *Richardson* or take sides in the circuit conflict because we find that the district court's decision not to hold a hearing passes muster under either standard of review.

substitute Magna hard drives for the Wang or Yipcon hard drives originally contracted for. According to the defendants, Agent Shintani's sole reliance on affidavits from former ADM employees and her failure to contact any Army officials amounted to reckless disregard for the truth. But in general, the failure to investigate fully is not evidence of an affiant's reckless disregard for the truth. *See United States v. Miller*, 753 F.2d 1475, 1478 (9th Cir. 1985); *United States v. Mastroianni*, 749 F.2d 900, 909–10 (1st Cir. 1984); *United States v. Young Buffalo*, 591 F.2d 506, 510 (9th Cir.), *cert. denied*, 441 U.S. 950 (1979). As the district court explained, probable cause "does not require an officer to exhaust every possible lead, interview all potential witnesses, and accumulate overwhelming corroborative evidence." Warehouse Memorandum at 18. In fact, Agent Shintani's failure to contact Army officials may have been entirely prudent given the possibility of a leak back to ADM. According to the affidavit, one informant "indicated that Dale and ADM President Ashton would certainly destroy any incriminating records if they were subpoenaed. She stated Dale would do anything to avoid detection." JA 258. Rather than evincing a reckless disregard for the truth, the agent's actions amounted to *at most* negligence which is insufficient to warrant a *Franks* hearing. *See Franks*, 438 U.S. at 171.

The defendants next argue that the affiant misrepresented Bowers' credibility in the affidavit by describing him as a "Confidential Informant" when Bowers was himself under investigation.[45] However, an affiant's failure to disclose the backgrounds and alleged biases of informants does not establish the affiant's reckless disregard for the truth. *See United*

[45] The government asserts that arguments relating to the affiant's alleged misrepresentation of Bowers' credibility have been waived because they were not raised below. *See* Government Brief at 44 n.18. However, in their Memorandum in Support of Motion to Suppress Tangible Evidence and Its Fruits Seized in Search of ADM Offices, the defense counsel complained of the "bias of Bowers" who "himself was under investigation." JA 240–41. Further, at the argument on the suppression motion, defense counsel reiterated this concern.

States v. Wold, 979 F.2d 632, 634 (8th Cir. 1992) (failure to disclose that informant had been drug dealer, was cooperating with police in order to receive leniency and was being paid by police did not amount to misrepresentation); *United States v. Levasseur*, 816 F.2d 37, 43–44 (2d Cir. 1987). Moreover, including in the affidavit the fact that Bowers was himself under investigation would not have defeated probable cause because Bowers' information was corroborated by other informants. According to the district court, "Bowers' credibility would have been of no moment" to the magistrate since three other informants had corroborated Bowers' testimony with "independent, consistent, interlocking information." Warehouse Memorandum at 13; *see United States v. Humphreys*, 982 F.2d 254, 258–59 (8th Cir. 1992) (defendant "fails to understand that, while he may believe that the informants lacked credibility, where the informants' information is at least partially corroborated, attacks upon credibility and reliability are not crucial to the finding of probable cause"); *United States v. Coronel*, 750 F.2d 1482 (11th Cir. 1985) (description of informant as "legitimate businessman," even if recklessly false, did not defeat probable cause which existed apart from informant's status); *United States v. Haimowitz*, 706 F.2d 1549, 1556 (11th Cir. 1983) (failure to disclose informant's criminal record did not undermine probable cause where informant's first-hand information was corroborated by other sources); *United States v. Dennis*, 625 F.2d 782, 791 (8th Cir. 1980).[46]

[46] The defendants also argue that the affiant's failure to disclose that Bowers had previously given several contradictory statements to two different government agents also warranted a *Franks* hearing. However, the district court carefully considered the alleged discrepancies and found that, by and large, each could be "effortlessly harmonized." Warehouse Memorandum at 10–12. Further, as indicated above, the district court reasoned that "[e]ven if [the magistrate] had rejected Bowers' statements as coming from a source unworthy of belief, she would still be left with the sufficient content in the warrant affidavit to support a finding of probable cause 'because the tainted information . . . was merely cumulative of criminal activity.'" *Id.* at 13 (quoting *United States v. Grunsfeld*,

Finally, the defendants charge that the Shintani affidavit falsely stated that former employee Margo George had served as an informant because the affidavit of a defense investigator, William Corboy, reported George as saying that she had never provided information about ADM to any law enforcement agency. The district court correctly rejected this contention as well. A *Franks* hearing should be justified by "[a]ffidavits or sworn or otherwise reliable statements of witnesses ... or their absence satisfactorily explained." *Franks*, 438 U.S. at 171. It is problematical whether a defense investigator's summary of unsworn statements of an informant generally fits the description of "otherwise reliable." Here the district court reasonably concluded that where the "defendants have not made any attempt to explain the absence of an affidavit from George herself," an affidavit from an investigator purporting to describe George's statements to him was insufficient to warrant a *Franks* hearing. Warehouse Memorandum at 20–21. In addition, given the defendants' assertion in their motion to suppress that George was "terminated for incompetence" and that she "bore ill will toward" ADM, JA 240, it is not surprising that George might deny to an investigator employed by ADM that she had given information about ADM to a law enforcement agency. Further, the information allegedly provided by George in the affidavit was so precise, including exact locations of particular documents at ADM, that in order for the district court to credit the Corboy declaration, it would have been necessary for the court to conclude that Agent Shintani had herself fabricated much of that specific information.[47]

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558 F.2d 1231, 1240 (6th Cir.), *cert. denied*, 434 U.S. 872 (1977)). We have no cause to disturb these conclusions.

[47] The defendants also allege that the agent misrepresented in her affidavit that informant Charles Roth had knowledge of ADM's tax evasion because Corboy reported that Roth told him that he had no *independent* knowledge of ADM's tax evasion. However, Agent Shintani's affidavit did not purport to reflect Roth's independent knowledge but stated only that Roth knew of the establishment of dummy corporations for the purpose of evading taxes.

The Supreme Court has admonished lower courts that affidavits for search warrants

> must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.

United States v. Ventresca, 380 U.S. 102, 108 (1965). Against this backdrop, it is apparent that the district court correctly refused to hold a *Franks* hearing because the defendants failed to make a substantial preliminary showing that the government had knowingly, intentionally or recklessly disregarded the truth.[48]

B. Warrant

The Fourth Amendment prohibition against general warrants requires the government to provide a particular description of the items to be seized. *See United States v. Maxwell*, 920 F.2d 1028, 1031 (D.C. Cir. 1990). In assessing particularity, courts " 'are concerned with realities of administration of criminal justice. It is sufficient if the warrant

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[48] In their supplemental brief, the defendants assert that the district court may have erroneously subjected them to the higher burden of actually establishing the affiant's reckless disregard for the truth because at one point the court stated that the defendants had not "*shown* that the affiant in fact entertained serious doubts as to the truth of [her affidavit]." Warehouse Memorandum at 17 (internal quotation omitted) (emphasis added). However, it is abundantly clear to us that the district court, which repeatedly correctly noted that the defendants were required to make only a substantial preliminary showing of the affiant's reckless disregard for the truth, *see* Warehouse Memorandum at 5, 7, 8, 21, recognized and applied the correct legal standard and in the single passage cited by the defendants was merely substituting the abbreviated "shown" for the more cumbersome "made a substantial preliminary showing."

signed by the judicial officer is particular enough if read with reasonable effort by the officer executing the warrant.'" *United States v. Vaughn*, 830 F.2d 1185, 1186 (D.C. Cir. 1987) (quoting *Moore v. United States*, 461 F.2d 1236, 1238 (D.C. Cir. 1972)). In this case, the defendants urge that the warrant was not particular enough and therefore that the district court erred in refusing to suppress the evidence seized from ADM's offices.

The search warrant sought "records and documents as further described in Attachment B." JA 249. Attachment B in turn stated that the property to be seized consisted of documents which "are believed to contain specific information regarding the false statements and claims made by ADM." JA 262. More specifically, Attachment B permitted seizure of "business records including, but not limited to," various categories of documents, such as invoices, receipts and correspondence. Each category was divided in the sentence by semi-colons and at the end of the list, followed by a comma, was the phrase "and other records which relate to the criminal scheme outlined in the above affidavit" of Agent Shintani. Finally, the records to be seized were limited to those that "relate to the period June 1, 1984 through the present." The defendants complain that the warrant was unduly general because some of the items identified (e.g., "internal documents, including agenda and minutes of board of directors meetings") were too broad, and because the permission to seize records "including, but not limited to" those listed exposed any and all documents to seizure.

The district court found that the warrant was not overly broad because first, the warrant identified specific and limited categories of records to be seized, and second, the warrant limited the search to documents associated with the allegations made in the Shintani affidavit. Warehouse Memorandum at 24–25. We cannot agree with the district court's first ground for upholding the search. The warrant's explicit authorization to the agents to seize "business records including, but not limited to" those specifically identified subjected essentially all of ADM's records dated after June 1, 1984 to seizure and therefore the warrant, by itself, was not suffi-

ciently particular. *See Center Art Galleries–Hawaii, Inc. v. United States*, 875 F.2d 747, 749–50 (9th Cir. 1989); *Rickert v. Sweeney*, 813 F.2d 907, 908–09 (8th Cir. 1987). However, we concur in the district court's view that incorporation of Agent Shintani's affidavit into the warrant provided a sufficient limitation on the government's search. As we have explained:

> [I]n some circumstances a search warrant may be construed with reference to the affidavit supporting it for purposes of satisfying the particularity requirement. The affidavit may serve this function, however, only if (1) the affidavit accompanies the warrant, and in addition (2) the warrant uses suitable words of reference which incorporate the affidavit by reference.

Maxwell, 920 F.2d at 1031 (internal quotation omitted).

Taking the second requirement first, the district court expressly found that the search warrant "incorporated by reference the affidavit underlying the search warrant." Warehouse Memorandum at 3–4. More specifically, the court maintained that the "records sought relate to the criminal scheme outlined in the affidavit underlying the search warrant," and that it was "clear that ... allegations [in the affidavit], for which the Magistrate found probable cause, were used to refine the scope of the warrant." Warehouse Memorandum at 25–26. Conversely, the defendants contend that the phrase in the warrant which makes reference to the affidavit does not limit all the items to be seized but only identifies an additional omnibus category of documents related to the Shintani affidavit which may be seized. We do not accept this interpretation as a fair reading of the warrant as a whole. *See Andresen v. Maryland*, 427 U.S. 463, 479–82 (1976); *United States v. Johnson*, 690 F.2d 60, 64 (3d Cir. 1982), *cert. denied*, 459 U.S. 1214 (1983). The phrase "and other records which relate to the criminal scheme outlined in the above affidavit," is set apart by a comma from the specific categories of documents and therefore appears to modify the entire sentence. Perhaps more importantly, the first two sentences of Attachment B state:

> Based on the information provided by the Confidential Informants and the experience of the affiant, it is believed that the below listed documents are still in ADM's possession. These documents are believed to contain specific information regarding the false statements and claims made by ADM.

JA 262. Thus, the common-sense reading of the warrant is that the government could seize a variety of specifically identified documents and any other records that related to the product substitution and tax evasion allegations made in Agent Shintani's affidavit. We therefore affirm the district court's decision that the warrant contained " 'suitable words of reference' evidencing the magistrate's explicit intention to incorporate the affidavit." *Maxwell*, 920 F.2d at 1032; [49] *see*

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[49] In *Maxwell*, a statement in the warrant that the magistrate had found the supporting affidavit to establish probable cause did not constitute a sufficient incorporation. 920 F.2d at 1032; *see also United States v. George*, 975 F.2d 72, 76 (2d Cir. 1992) (warrant which stated that "it is 'issued upon the basis of an application and affidavit[ ] of' Patrolman Brickell does not direct the executing officers to refer to the affidavit for guidance concerning the scope of the search and hence does not amount to incorporation by reference"). However, the *Maxwell* court continued:

> Although we hold that the warrant in this case did not incorporate the affidavit by reference, we recognize that the "realities of administration of criminal justice," *Moore v. United States*, 461 F.2d at 1238, counsel against an overly exacting standard for determining when a warrant successfully incorporates a supporting affidavit. In this case, we believe it would have been sufficient if the warrant, in addition to referencing "Attachment # 2" [a list of items to be seized] in the space provided for describing the items to be seized, had also made some reference in that space to the affidavit or to "Attachment # 3," which is how the affidavit was captioned in the warrant application presented to the magistrate.

920 F.2d at 1033 n.4. In the present case, the references in the warrant to the affidavit were not made with regard to probable cause nor were they simply descriptive of the background of the warrant. Instead, the warrant expressly incorporated the Shintani

also In re Search Warrant, 572 F.2d 321 (D.C. Cir. 1977) (warrant which commands executing officers to seize evidence "which facts recited in the accompanying affidavit make out" incorporates the affidavit), *cert. denied*, 435 U.S. 925 (1978).

While the warrant undoubtedly incorporated the limitations of the affidavit, the record is not clear whether the other requirement, that "the affidavit accompan[y] the warrant," was literally satisfied. *Maxwell*, 920 F.2d at 1031; *see also United States v. Tagbering*, 1993 WL 19017 at *3 (8th Cir. Feb. 1, 1993); *Vaughn*, 830 F.2d at 1186; *cf. Rickert*, 813 F.2d at 909 ("An affidavit may provide the necessary particularity for a warrant if it is either incorporated into or attached to the warrant ... [or] is merely present at the search."). In its memorandum in opposition to the defendants' motion to suppress, the government stated that "[i]n executing the warrant, the lead agent, Agent Heidi Shintani, had the warrant and affidavit in her possession. As the agents located documents, to the extent they had questions, they consulted her to make sure the documents seized were described in the affidavit." JA 333. The defendants, on the other hand, argued that the affidavit must not have been "readily available" because ADM representatives did not themselves see the affidavit at the search. JA 244–45 & n.7. The district court did not resolve this factual dispute in denying the defendants' motion to suppress. At trial, testimony regarding the use of the affidavit by the executing agents was prohibited by the district court as potentially confusing to the jury since the affidavit involved primarily product substitution charges no longer made against the defendants. However, Agent Shintani explained:

> Prior to the search, I had written up a search plan and instructed all the agents to follow specific procedures, and those were to, as they searched a specific location, which we designated beforehand, that they were to collect everything that they were authorized to seize, and identify it as having taken it.

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affidavit and thereby limited the permissible scope of the government's search.

. . . .

I was the supervisor, I was there to answer questions that any agents had throughout the day.

. . . .

When we'd find a box with army invoices, which was what we were looking for at the time, we'd look in and see if they had the particular item we were looking for, and if we didn't find them, we'd put them back, so we just took the ones that had what we were specifically looking for.

Tr. 2694, 2699, 2786. This evidence indicates, at the very least, that Agent Shintani, who prepared the affidavit and obtained the warrant, was present at the search, oversaw the warrant's execution and guided the participating agents in seizing documents to conform the search to her understanding of the warrant's requirements. While it is not altogether clear that the affidavit accompanied the warrant at the search, we are satisfied that the precautions taken by the government sufficiently limited the discretion of the executing agents.

In sum, the warrant was not so broad as to rise to the level of a general warrant. Courts may take into consideration the circumstances of the crime in assessing the degree of particularity that should be required of descriptions of items to be seized in the warrant. The Tenth Circuit has written that "[t]he type of criminal activity under investigation in the present case—a drug dealing business—makes it difficult to list with any greater particularity the books and records desired to be seized which evidences such activity." *United States v. Harris*, 903 F.2d 770, 775 (10th Cir. 1990); *see also United States v. Cardwell*, 680 F.2d 75, 78 (9th Cir. 1982). In the case of product substitution and tax evasion allegations, specificity is even more difficult because evidence of the crimes can be found in almost every type of business document conceivable. Here, we conclude that the warrant was not constitutionally infirm because it identified several specific categories of documents to be seized, incorporated an affidavit to limit the search and was executed by the affiant pursuant to a specific plan.

The defendants argue that even if the warrant was not impermissibly general, the district court erred in refusing to conduct a hearing to determine whether the executing agents in fact complied with the warrant's limitations. In order to be entitled to such a hearing, the defendants were required to make "factual allegations which, if established, would warrant relief." *United States v. Thornton*, 454 F.2d 957, 967 n.65 (D.C. Cir. 1971). The defendants complained to the district court that the length of the search and the volume of the documents seized were excessive, but, as the district court correctly concluded, such assertions were insufficient to establish a constitutional violation. Warehouse Memorandum at 26 (citing *United States v. Sawyer*, 799 F.2d 1494, 1509 (11th Cir. 1986), *cert. denied*, 479 U.S. 1069 (1987)). The defendants failed to allege that the executing agents ignored the warrant's limitations or to identify to the district court the documents they claimed to have been improperly seized. Warehouse Memorandum at 27–28; *see Humphreys*, 982 F.2d at 259. Without such allegations, the district court was under no obligation to hold an evidentiary hearing on how the search was executed.

V. Wire Fraud

Count 5 charged the defendants with committing "wire fraud," in violation of 18 U.S.C. § 1343, by wiring $316,000 from a Washington, D.C. bank to Bourbonia's Swiss account in furtherance of the alleged scheme to defraud the United States of taxes. All defendants argue that their convictions on count 5 must be reversed because the Internal Revenue Code supplies the exclusive basis for tax fraud prosecutions.

The sole decision cited by the parties or found by the court in full support of the defendants' argument is *United States v. Henderson*, 386 F. Supp. 1048 (S.D.N.Y. 1974) (mail fraud counts dismissed on ground that Congress did not intend application of mail fraud statute to schemes to defraud government of tax revenue) (Weinfeld, J.). While *Henderson* gives us some pause, we judge it the sounder course to adopt the position and reasoning of all other courts that have

published decisions squarely on point. *See, e.g., United States v. Condo*, 741 F.2d 238, 239 (9th Cir. 1984) (per curiam) (mail fraud and § 7206(2) offense), *cert. denied*, 469 U.S. 1164 (1985); *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1186–88 (4th Cir. 1982) (mail fraud plus making false claims to United States Government), *cert. denied*, 459 U.S. 1105 (1983), *overruled in nonrelevant part by Busby v. Crown Supply, Inc.*, 896 F.2d 833, 841 (4th Cir. 1990); *United States v. Shermetaro*, 625 F.2d 104, 109–11 (6th Cir. 1980) (conspiracy to defraud United States and tax evasion). Accordingly, we hold that the tax code is not the exclusive regime under which tax fraud schemes may be prosecuted and we uphold the wire fraud convictions.

VI. Constructive Amendment of Indictment

All defendants contend that count 1 was constructively amended, impermissibly, to include a separate conspiracy, one to perform acts of concealment after abandonment of the central objectives of the charged conspiracy.[50] "A constructive amendment occurs when the evidence presented at trial *and* the instructions given to the jury so modify the elements of the offense charged that the defendant may have been convicted on a ground not alleged by the grand jury's indictment." *United States v. Sayan*, 968 F.2d 55, 59–60 (D.C. Cir. 1992) (emphasis in original, internal quotations and citations omitted). It suffices to point out that, in this case, the trial judge's charge closely tracked the language of the indictment. On that ground, and without reaching other infirmities in the defendants' argument, we judge the defendants' constructive amendment objection insubstantial.

VII. Sweeney's Motion for Acquittal

Sweeney contends that his opportunity to defend was prejudicially affected by the failure of the trial judge to rule

[50] "Separate conspiracy" is the defendants' characterization. The scope of the conspiracy here, however, was a question of fact within

immediately on the motion to acquit Sweeney made at the close of the government's case. Because Sweeney invited any oversight that may have occurred, we reject his current plea.

On July 10, 1990, Sweeney filed at the clerk's office a written Motion for Judgment of Acquittal premised on the government's alleged failure to prove a *prima facie* case. Sweeney's counsel did not state or refer to that motion in court the next day, July 11, when the government rested. On that day, the trial judge inquired of defense counsel:

> All right, let me ask counsel, the government has rested, and with respect to a defense case at this point, where do we stand? I mean, am I—I'm not sure the defendants are going to make motions, I'm not sure whether the defendants are ready to go forward this afternoon before the jury, or what?

Tr. 3497. After a short recess, in the presence of Sweeney's counsel, counsel for ADM advised the court:

> I believe I speak on behalf of all the defendants, your honor, it's the intention of the defendants to rest at this point.

Tr. 3497–98. Sweeney's counsel said nothing of his filed motion for acquittal. Nor did Sweeney's counsel request a ruling on the motion during the next several days, i.e., the time running from the July 11 close of evidence to the July 19 charge to the jury.

Absent defendant's consent, it is error for the trial judge to defer ruling on a motion to acquit made at the close of the government's case. *See, e.g., United States v. Neary*, 733 F.2d 210, 218–19 (2d Cir. 1984); *United States v. Rhodes*, 631 F.2d 43, 44–45 (5th Cir. 1980) ("application of any other rule would penalize a defendant for a trial court's *refusal* to issue a ruling at the time clearly required by our previous cases") (emphasis added); *see also* Fed. R. Crim. P. 29(a) (governing such motions). A defendant, however, may agree to deferral

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the jury's ken; a single conspiracy indeed may include both tax evasion and its concealment. *See, e.g., United States v. Cunningham*, 723 F.2d 217, 228–29 (2d Cir. 1983), *cert. denied*, 466 U.S. 951 (1984).

of a ruling on the motion either expressly or by failing to object. *See, e.g., United States v. Dreitzler*, 577 F.2d 539, 552 (9th Cir. 1978), *cert. denied*, 440 U.S. 921 (1979); *United States v. Brown*, 456 F.2d 293, 294 (2d Cir.) ("Absent ... a demand [for an immediate ruling] the situation is treated as if the court had denied the motion."), *cert. denied*, 407 U.S. 910 (1972). In this case, "[g]iven [defendant's] inexplicable failure to correct the [trial] court's apparent misapprehension" that no motion awaited immediate attention, "[defendant] cannot now complain of a ruling based on that misapprehension." *See United States v. Wider*, 951 F.2d 1283, 1287 (D.C. Cir. 1991) (affirming trial court's denial of defense motion for Jencks Act material).

VIII. Conflict of Interest

Sweeney argues that his pretrial counsel's conflict of interest severely constrained Sweeney's ability to protect himself against prosecution. The district judge properly refused to address this matter because it was raised far too late.

During the grand jury investigation Sweeney was represented by John Kotelly who was simultaneously representing ADM and Segal. That multiple representation, Sweeney asserts, precluded Kotelly from advising Sweeney to seek immunity from the government in exchange for testimony against his co-defendants. Once indicted, Sweeney promptly engaged new counsel. Not until *after* the jury returned guilty verdicts did Sweeney complain about Kotelly's conflict of interests.

Nonjurisdictional objections to the institution of a prosecution, including the conduct of grand jury proceedings, ordinarily are waived unless raised pretrial, although the district court may grant relief from the waiver for good cause shown. *See* Fed. R. Crim. P. 12(b)(1) & (2), (f); *United States v. Madeoy*, 912 F.2d 1486, 1490–91 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 1008 (1991). Sweeney knew of Kotelly's multiple representation from the start and tendered no cause at all for his long-delayed objection.

IX. Jury Charge Issues

The defendants raise several challenges to the jury charge; none of them warrants upsetting the verdicts.

A. Plain Error

We take up first two instructions the defendants earlier approved: the definition of conspiracy to defraud the United States that the defendants themselves proposed, and an explanation of "deduction" the defendants ultimately accepted, although they preferred a different instruction. When no objection is made before the jury retires, an instruction is reviewed only for "plain error affecting a substantial right so that a miscarriage of justice would otherwise result." *United States v. Lancaster*, 968 F.2d 1250, 1254 (D.C. Cir. 1992); *see also* Fed. R. Crim. P. 30, 52(b). In our review we consider "the evidence adduced at trial, the arguments of counsel, . . . the content of the entire jury instruction," and whether, as in this case, the jury had a copy of the indictment during its deliberations. *Sayan*, 968 F.2d at 60 (quoting *United States v. Chan Chun-Yin*, 958 F.2d 440, 444 (D.C. Cir.), *cert. denied*, 112 S. Ct. 3010 (1992)). This court is "especially reluctant to reverse for plain error when it is 'invited.'" *United States v. Mangieri*, 694 F.2d 1270, 1280 (D.C. Cir. 1982).

B. Conspiracy to Defraud the United States

The district court described the alleged conspiracy to defraud as an agreement "to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Internal Revenue Service in the ascertainment, computation, assessment and collection of income taxes." Tr. 4517; *see also id.* at 4516 (court read to jury portion of indictment containing same definition). The defendants argue that this instruction contains terms in need of more precise definition, all the more so because the government's admission that the defendants had actually paid all the taxes due "narrowed the conspiracy," leaving its purpose obscure. Dale Brief at 31.

The defendants isolate an instruction that is properly read in context. The district judge read portions of the indictment to the jury as part of its instructions and gave an adequately detailed explanation of the law of conspiracy taken from the standard District of Columbia jury instructions. The charge

was at least as informing as the one we upheld in *United States v. Treadwell*, 760 F.2d 327, 337 & n.16 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 1064 (1986).

The defendants nevertheless urge that the imprecision of the conspiracy to defraud definition left the jury free to convict on the misguided notion that lawful conduct, in particular, the filing of an amended return, could demonstrate the requisite disturbance of a governmental process. This implausible argument again omits consideration of the charge as a whole. The trial court's instructions made it clear that a conspiracy to defraud the United States required willful action with specific intent to deceive or cheat. On the point of special concern to the defendants, the district judge instructed later in his charge that "[t]he government encourages [the] use [of amended returns] as a means of correcting mistakes. Therefore, the filing of an amended return is not necessarily evidence of intentional misconduct in the filing of the original return." Tr. 4548. We note, in addition, that the government's closing argument focused on the knowledge and specific intent of each defendant. *See Chan Chun-Yin*, 958 F.2d at 444 (considering government's closing statement in plain error measurement of jury charge). In sum, no plain error infected the district court's explanation of the offense of conspiracy to defraud the United States.

C. Deductible Expenses

On deductible expenses, the defense originally requested this instruction:

> The issue for you to decide is whether the Government has proven beyond a reasonable doubt that the $500,000 accrual for software development costs and the $316,000 paid to Bourbonia did not represent ordinary and necessary expenses of ADM's business.
>
> An ordinary and necessary expense is one that is appropriate and helpful to the conduct of the taxpayer's business. For example, the costs of software development and marketing studies would normally be deductible

> expenses for a company like ADM that is in the business of selling software and related products.

ADM Brief at 32. Instead, on agreement of all counsel, the trial judge gave a much shorter instruction defining "deduction":

> The term "deduction" means any item allowed by the internal revenue laws to be subtracted from gross income in computing the amount of taxable income for income tax purposes.

Tr. 4547.

The defendants argue that the abbreviated instruction, and the failure to give the originally requested instruction, left it open to the jury to convict simply upon finding that documents supporting claimed deductions were false.[51] This matter, however, was addressed earlier in the instructions. The district judge charged

> [a]s to both counts 2 and 3, you are further instructed that if a person in good faith believes that an income tax return truthfully reports the taxable income and allowable deductions of the taxpayer ... he or she cannot be guilty.

Tr. 4534. Similarly, the judge charged on count 4 that "if a person in good faith believes that he has paid all the taxes that he owes, he cannot be guilty." Tr. 4537. The absence from the charge of a deductible expense definition of the kind proposed by the defendants, in this light, was not error, and surely not plain error.

D. Truth as Defense

Ashton, ADM, and Dale assert error in the trial court's refusal to give an instruction on truth as a defense to the

[51] Defendants emphasize the instruction that the jury could convict if it found "that the Government has established beyond a reasonable doubt that any one of these items was falsely reported on the return." Tr. 4533.

charge of violating 28 U.S.C. § 1001.[52] Counsel proposed the truth-as-a-defense instruction for the first time after closing arguments and final jury instructions. The district judge committed no reversible error by failing to supplement his charge, for "the substance of [the defense] theory was conveyed in the jury instructions as a whole." *Sayan*, 968 F.2d at 63 & n.9 (citing *United States v. Tarantino*, 846 F.2d 1384, 1400 (D.C. Cir.), *cert. denied*, 488 U.S. 867 (1988)); *see also United States v. GAF Corp.*, 928 F.2d 1253, 1263 (2d Cir. 1991) (no duty to marshal evidence).

The supplemental charge the defendants requested read:

> With respect to counts 6 through 10, if you find that the Defense Department forms allegedly filled out by the defendants Dale, Ashton[,] and Automated Data Management were, in fact, true when made by defendants Dale, Ashton[,] and Automated Data Management, you must find these defendants not guilty of the specific counts.

Tr. 4570. The proposed charge was designed to highlight the defendants' argument, discussed above in connection with the sufficiency of the evidence, that Dale and Ashton may not have qualified as legal owners of Hong Kong companies Swaffham and Gemona at the relevant time. (The transfer documents, the defendants had emphasized, remained to be stamped.)

The instructions included in the charge, as the district court observed to counsel, captured the correct proposition that *full* and truthful disclosure would require acquittal on counts 6 through 10. *See* Tr. 4565, 4567, 4568. On counts 6 through 9 the court explained that "a trick, scheme or device" necessitated *inter alia* nondisclosure of a "fact." Tr. 4543–44. Similarly on count 10, the judge charged the jury that the government was required to prove, *inter alia*, "that the defendant made a false statement or made a false writing or

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[52] Defendants also argue that this omission, and other errors asserted in connection with the section 1001 convictions, affect the conspiracy convictions. Because we uphold the section 1001 convictions, we do not reach this argued interrelationship.

document in relation to a matter within the jurisdiction of the Department of Defense." Tr. 4545. The judge also instructed that "[t]he prosecution has the burden of proving beyond a reasonable doubt that the defendant ... knowingly and willfully made a false statement." Tr. 4546. We discern no fatal omission or infirmity in these instructions.

E. Reasonable Doubt

Over the objections of all defendants, the trial judge used the standard "Red Book" definition of reasonable doubt:

> Reasonable doubt, as that name implies, is a doubt based on reason, *it is a doubt for which you can give a reason.* It is such a doubt as would cause a juror, after careful and candid and impartial consideration of all the evidence, to be *so undecided* that he cannot say that he has an abiding conviction of the defendant's guilt. It is such a doubt as would cause a reasonable person to hesitate or to pause in the graver or more important transactions of life. However, it is not a fanciful doubt, nor a whimsical doubt, nor a doubt based on conjecture. It is a doubt that is based on reason. The government is not required to establish guilt beyond all doubt or to a mathematical certainty or to a scientific certainty. The government's burden is to establish guilt beyond a reasonable doubt.

Tr. 4506–07 (emphasis added to phrases defendants contest).[53] The defendants argue that the words "a doubt for which you can give a reason" imply that a juror must be able to *articulate* a reason; such a requirement, the defendants urge, impermissibly lowers the government's persuasion burden. ADM Brief at 36–37; *see Cage v. Louisiana*, 498 U.S. 39, —, 111 S. Ct. 328, 329–30 (1990) (disapproving inclusion in "reasonable doubt" charge of definitional words: "such doubt as would give rise to a grave uncertainty," "an actual substantial

[53] *See* Criminal Jury Instructions for the District of Columbia, No. 2.09 at 46 (3d ed. 1978) (substantially identical language). In *Moore v. United States*, 345 F.2d 97, 98 & n.1 (D.C. Cir. 1965), we approved a similarly worded charge.

doubt," "a moral certainty"); *Perez v. Irwin*, 963 F.2d 499, 502 (2d Cir. 1992) (disapproving definition of "reasonable doubt" as "doubt to a moral certainty"). The defendants consider the words "so undecided" to exacerbate the problem by conveying the impression that a high degree of indecision is needed in order to find a defendant not guilty. *See* ADM Brief at 38 n.49.

We are satisfied that, "in the context of the instructions as a whole and the trial record," there is no "reasonable likelihood that the jury . . . applied the challenged instruction in a way that violates the Constitution." *See Estelle v. McGuire*, 112 S. Ct. 475, 482 (1991) (citations and internal quotations omitted). The instruction in its entirety fairly conveyed that the requisite doubt must be "based on reason" as distinguished from fancy, whim or conjecture. *Cf. Cage*, 498 U.S. at —, 111 S. Ct. at 329 (Court did *not* find offensive instruction that "a reasonable doubt" is one "founded upon a real tangible substantial basis and not upon mere caprice and conjecture").

X. Sentencing Issues

A. Straddle Offenses

The defendants argue that the trial court erred in sentencing them on count 1 under the Sentencing Guidelines ("Guidelines") because: (1) the Guidelines should not apply unless every element of the offense is satisfied by conduct occurring after the Guidelines took effect on November 1, 1987; (2) the false statements purpose of the conspiracy was completed by November 1, 1987, and since the jury's verdict did not specify whether the purpose of the conspiracy was to make false statements or to evade taxes it is unclear whether the jury found that the conspiracy continued after November 1, 1987; or (3) the jury did not explicitly find that each defendant continued to be involved in the conspiracy after that date. We reject each of these arguments.

First, we agree with every circuit which has addressed the issue that the Guidelines apply to offenses that begin before

November 1, 1987, and continue after that date. *See United States v. Thomas*, 895 F.2d 51, 57 (1st Cir. 1990); *United States v. Underwood*, 932 F.2d 1049, 1053–55 (2d Cir.), *cert. denied*, 112 S. Ct. 382 (1991); *United States v. Rosa*, 891 F.2d 1063, 1069 (3d Cir. 1989); *United States v. Engleman*, 916 F.2d 182, 185 (4th Cir. 1990); *United States v. Van Nymegen*, 910 F.2d 164, 166 (5th Cir. 1990); *United States v. Sloman*, 909 F.2d 176, 182–83 (6th Cir. 1990); *United States v. McKenzie*, 922 F.2d 1323, 1328 (7th Cir.), *cert. denied*, 112 S. Ct. 163 (1991); *United States v. Tharp*, 892 F.2d 691, 693–95 (8th Cir. 1989); *United States v. Kohl*, 972 F.2d 294, 297–98 (9th Cir. 1992); *United States v. Williams*, 897 F.2d 1034, 1040 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 2064 (1991); *United States v. Terzado-Madruga*, 897 F.2d 1099 (11th Cir. 1990).

Second, although the jury's general verdict did not specify whether the purpose of the conspiracy was to make false statements or to evade taxes, the district court itself determined that both objects of the conspiracy continued after November 1, 1987. Since the timing of the conspiracy in this regard implicates sentencing only, the district court was entitled to make a factual determination on its duration under a preponderance of the evidence standard. *See Underwood*, 932 F.2d at 1055. In their Memorandum Concerning the Non-Applicability of the Sentencing Guidelines, the defendants argued to the district court that, "the general verdicts of guilty on Count One clearly do not establish that defendants participated in a conspiracy continuing beyond November 1, 1987." However, the court responded in an order: "After giving careful consideration to the defendants' objection to the applicability of the Sentencing Guidelines to Count 1 of the indictment the Court concludes that the Guidelines apply to that Count...." JA 1772. The district court also subsequently adopted the factual findings of the defendants' presentence reports,[54] which described both objects of the

[54] The district court held: "I find for the purpose of the record that the presentence reports in this record set forth an adequate reflection of the facts presented in this case." JA 1811.

conspiracy as continuing after November 1, 1987. Since the factual basis for the district court's decision that the Guidelines should apply to the conspiracy count is not clearly erroneous, we affirm. *Underwood*, 932 F.2d at 1055.

Third, the jury was not required to find that each of the defendants continued to participate in the conspiracy after November 1, 1987. Instead, the defendants had the burden of proving that they affirmatively withdrew from the conspiracy before that date, and because they failed to do so, the Guidelines were properly applied to them. *See United States v. Hirschfeld*, 964 F.2d 318, 323–24 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1067 (1993); *Williams*, 897 F.2d at 1040; *United States v. Watford*, 894 F.2d 665, 670–71 (4th Cir. 1990); *Rosa*, 891 F.2d at 1069.

B. Base Offense Level

The trial court assigned the defendants Ashton and Dale a base offense level of 16 under §§ 2T1.1 and 2T4.1 of the Guidelines, the level for a conspiracy to evade taxes with a tax loss of between $1,000,001 and $2,000,000. To reach this base offense level, the district court first treated the different objects of the conspiracy as separate counts of conviction pursuant to § 1B1.2, which provides that "[a] conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defen-

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Pursuant to 18 U.S.C. § 3742(d)(2), the presentence reports were made a part of the record on appeal, and under this circuit's protocol, were filed with this court under seal. In considering the defendants' objections to their sentencing, we have, of course, had occasion to review these reports in their entirety. For purposes of this opinion, however, we cite only to specific statements in those reports which defendants have explicitly discussed and objected to in their publicly filed briefs on appeal, their publicly filed submissions to the district court under Fed. R. Crim. P. 32(c)(3) or their statements in open court at sentencing under Fed. R. Crim. P. 32(a)(1)(B).

dant conspired to commit." Next, under § 3D1.2, the district court combined the object offenses "into a single Group," such that instead of sentencing the defendants for each object offense, the court would sentence the defendants on the basis of only one of the offenses.[55] Finally, according to § 3D1.3, which states that "the offense level applicable to a Group is the offense level ... for the most serious of the counts comprising the Group, i.e., the highest offense level of the counts in the Group," the district court selected a base offense level of 16 for tax evasion under §§ 2T1.1 and 2T4.1.

Dale and Ashton argue that because the jury verdict did not identify the conspiratorial object, it was error for the district court to use the tax evasion base offense level without first determining that, were it sitting as the trier of fact, it would convict the defendants of that offense. *See* U.S.S.G. § 1B1.2 application note 5; *United States v. Tham*, 948 F.2d 1107, 1115 (9th Cir. 1991). The record, however, indicates that the district court did make the required determination of the object of the conspiracy and therefore the base offense level calculation was not erroneous. The district court, after considering the record, explained: "I find, first, that the base level that the court must consider in the case of Mr. Dale is a base level of 16, that is, conspiracy with an attempt to avoid taxes or tax evasion, rather than one based on false statements." JA 1811. Further, as mentioned above, the court explicitly adopted the presentence reports and therefore adopted the conclusion of those reports that "[i]n this conspiracy, the defendant[s] [Dale and Ashton] attempted to evade both personal and corporate taxes." JA 2775, 2814. *See United States v. Terry*, 916 F.2d 157, 160 (4th Cir. 1990) (court may rely on presentence report for factual findings in setting defendant's sentence); *United States v. Murillo*, 902 F.2d 1169, 1172 (5th Cir. 1990) (same). Finally, since the jury convicted Dale and Ashton of the substantive offense of attempting to evade taxes, the district court could reasonably

[55] Section 3D1.2 provides in part that "[a]ll counts involving substantially the same harm shall be grouped together into a single Group." The presentence reports stated: "Since these object offenses involved acts that were part of the same course of conduct or common scheme or plan and substantially the same harm, they are grouped according to section 3D1.2." JA 2774.

assume that the jury believed as well that tax evasion was an object of the conspiracy. *See United States v. Hubbard*, 889 F.2d 277, 279 (D.C. Cir. 1989).

C. Tax Loss Computation

The defendants challenge the district court's calculation of the corporate tax loss, first arguing that the $417,532 payment to the Swaffham and Gemona accounts and the $311,643 concealment of Korean corporate income should not have been included in the tax loss because these amounts were later properly accounted for in the 1986 tax returns. This argument is meritless because the calculation of tax loss for Guidelines purposes includes the amount the taxpayer "evaded or attempted to evade," U.S.S.G. § 2T1.1, and therefore whether the conspirators completed the substantive offense is irrelevant for purposes of determining the offense level. *See Hirschfeld*, 964 F.2d at 324.[56]

Next, the defendants contend that because the tax evasion object was not completed, the district court should have reduced their offense level by three levels under § 2X1.1(b)(2), which provides that

> [i]f [the offense is] a conspiracy, decrease by 3 levels, unless the defendant or a co-conspirator completed all the acts the conspirators believed necessary on their part for the successful completion of the substantive offense or the circumstances demonstrate that the conspirators were about to complete all such acts but for apprehension or interruption by some similar event beyond their control.

The court's decision not to grant the reduction was not clearly erroneous because the record indicates that the offense would

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[56] Ashton argues additionally that these amounts should not be attributed to her because the evidence did not establish that she had joined the conspiracy at the time of these transactions. However, according to the facts in the presentence reports, as adopted by the district court, *see supra* note 54, Ashton was a member of the conspiracy in 1986 when these events transpired.

have been completed but for Bowers' resignation and refusal to turn over the incriminating tapes and documents he possessed. *See United States v. Oyegbola*, 961 F.2d 11, 13–14 (1st Cir. 1992).[57]

The defendants also argue that the district court should not have included certain amounts, alleged to be legitimate expenses, in calculating the corporate tax loss. The burden of proving mitigating sentencing factors was on the defendants, *see United States v. Cuellar-Flores*, 891 F.2d 92, 93 (5th Cir. 1989), but they failed to identify and quantify the payments they alleged to be legitimate, with the exception of one $88,000 payment. Even assuming that the defendants carried their burden with respect to this $88,000, the total attempted tax loss would not have fallen below $1,000,000 and therefore the base offense level would not have changed.

Finally, Ashton and Dale argue that the district court erroneously treated certain amounts of the corporate tax loss as constructive dividends in calculating the personal tax loss. The parties agree that a defendant's skimming of corporate receipts renders the defendant liable not only for the understatement of corporate income but also for the understatement of his personal income. *See United States v. Knight*, 898 F.2d 436, 437 (5th Cir. 1990); *United States v. Thetford*, 676 F.2d 170, 175 (5th Cir. 1982), *cert. denied*, 459 U.S. 1148 (1983). However, they argue that corporate funds diverted to the Swaffham and Gemona accounts and to Bourbonia should not have been treated as constructive dividends because they could not exercise control over the funds. In fact, however, the presentence reports, as adopted by the district court, characterized Swaffham and Gemona as 'paper' companies

[57] At sentencing, the district court briefly addressed this contention, stating that "[w]ith respect to the argument as to an incomplete conspiracy and a request that the court depart downward for that, I conclude that that argument must be rejected." Sentencing Transcript at 80. The presentence reports, which the district court adopted, *see supra* note 54, made even clearer that an offense level adjustment was unwarranted because the defendants' "attempts to cover up the criminality that underlay their conduct" was "precipitated by actions of co-conspirator David Bowers." JA 2770.

for they had no employees, just a bank account and mailing address in Hong Kong." JA 2765. Further, the record indicates that Dale and Ashton controlled these companies as directors, as 75% shareholders and, until March 1987, as signatories to the corporate accounts. With regard to the transactions in Europe, the presentence reports explained that Dale and Ashton had accounts in Bourbonia and that funds diverted to that company were not for the purpose of paying legitimate business expenses. To evince Dale's and Ashton's control over these funds, the presentence reports noted that a portion of the ADM funds diverted to Bourbonia was subsequently transferred to ADM H&S, a company owned 75% by Dale and Ashton, for "their own benefit." JA 2766. Accordingly, we do not think the district court erred in making the factual determination that the funds diverted from ADM to Swaffham, Gemona and Bourbonia should be considered constructive dividends because the funds came under the control of Dale and Ashton and the diversion was made primarily for their benefit. *See Stone v. Commissioner*, 865 F.2d 342, 343–44 (D.C. Cir. 1989).

D. Upward Adjustment

The trial court adjusted upward the offense level for Dale by four levels and the offense level for Ashton by three levels for their respective roles in the criminal activities. Section 3B1.1 permits a four-level increase if "the defendant was the organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive," and a three-level increase if "the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive." Dale and Ashton assert that their sentences must be remanded to the district court for an explicit finding on whether the upward adjustments were based on the extensiveness of the criminal activity or the fact that five or more persons participated. We disagree that a remand is necessary because the court's adjustments could appropriately have been founded on either factor based on the facts adopted

by the district court in the presentence reports for Dale and Ashton.[58]

These reports, which the district court found to "set forth an adequate reflection of the facts," JA 1811, specifically described the wide geographic reach of the criminal activity and the extensiveness of the actions taken to further the conspiracy, named Ashton and Dale as the leaders, and identified at least five persons who were involved in the scheme. Even more explicitly, the report for Dale stated he "was an organizer and leader in a criminal activity that involved more than five participants and was otherwise extensive." JA 2815. The report for Ashton was similarly worded. JA 2776. Since the district court was entitled to rely on the presentence reports in determining the defendants' sentences, *see Murillo*, 902 F.2d at 1172, we find no need for a remand.

E. Sweeney's Downward Departure

In sentencing Sweeney, the district court departed downward from the applicable Guidelines range approximately two levels on the basis of a § 5K1.1 substantial assistance motion.[59] On appeal, Sweeney complains that the extent of the departure, however, was based upon an improper application of the Guidelines because in sentencing him the district court impermissibly relied on a comparison to sentences typically imposed on drug couriers. We reject Sweeney's claim. In *Williams v. United States*, a case where the defendant appealed the district court's decision to depart upwards, the

[58] At sentencing, the district court stated that "[w]ith respect to Mr. Dale's role in the offense ... it seems to me that under the facts of this case ... as the jury has found them and as the court has heard the evidence, Mr. Dale must be assigned a plus four." Regarding Ashton's role, the court explained: "I do see a distinction here, ... I find that Ms. Ashton should be assigned ... a three, rather than a four."

[59] Section 5K1.1 provides: "Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines."

Supreme Court held that reviewing courts "must remand for sentencing: if the sentence was imposed as a result of an incorrect application of the Guidelines or if the sentence is an unreasonable departure from the applicable guideline range." 112 S. Ct. 1112, 1120 (1992). The appellant "bears the initial burden of showing that the district court relied upon an invalid factor at sentencing." *Id.*

The government contends that appellate courts have no authority to review a defendant's appeal of the extent of a downward departure, citing our pre-*Williams* decision in *United States v. Hazel*, 928 F.2d 420, 423–24 (D.C. Cir. 1991). The Fourth Circuit, however, has decided otherwise:

> If, as *Williams* held, a departure sentence may not stand unless a reviewing court determines that an invalid factor had no effect on the sentencing decision, it logically follows that an appellate court may not countenance a decision in which the district court extended an otherwise proper departure sentence based upon a circumstance that could not have supported a departure in the first instance. The reasoning of *Williams* dictates that a sentencing court may not consider in determining the extent of a departure from the guideline range a factor that would not constitute a valid basis for departure.

United States v. Hall, 977 F.2d 861, 865 (4th Cir. 1992). For purposes of this case, we need not determine if *Hazel* and *Hall* are in conflict or determine the effect of *Williams* on *Hazel*. For even were we to review Sweeney's sentence, we would conclude that remand is unnecessary because Sweeney did not meet his burden of showing that the district court relied on an invalid factor, i.e., a comparison to sentences imposed on drug couriers, in sentencing him.

The record indicates that the comparison was made not as a basis for the sentence but to provide a measure of comfort to Sweeney. The court began: "Now, these sentences you are possibly facing may seem harsh, but I think I should just draw a reference to other individuals who appear before this court day in and day out." It explained with regard to drug couriers:

> [T]hey face a mandatory sentence of ten years imprisonment, and the government takes a very hard view on whether or not they should be considered in certain circumstances as having given substantial assistance, so that they are taken out of that range. Ten years in prison, with no sophistication at all. So that's one of the things that I also weigh in taking—in consideration of what should be done in any other cases.

JA 1885–86. Next, the district court clarified that it was "not in favor of the mandatory minimum in some cases, but that doesn't apply here...." JA 1886. Viewing the statements as a whole, it appears that the district court was simply explaining to Sweeney that, by comparison, the sentences he faced were not that harsh. Moreover, the court made clear what factors it was relying on to make the approximate two-level departure, including: a comparison of the sentences imposed on Sweeney's co-defendants; the fact that Sweeney had "already been given credit" for accepting responsibility; that "under the facts of the case" a departure to a probationary sentence was unwarranted; and that Sweeney had had "plenty of opportunity to stop" the scheme. JA 1886–89. Thus, while it might have been inappropriate for the district court to base Sweeney's sentence even in part on the sentences imposed on drug couriers, *see* 18 U.S.C. § 3553(a)(6), we do not believe that Sweeney met his burden of showing that the district court actually relied on this factor.

F. Merger of Internal Revenue Code Offenses

All defendants contend that their convictions under 26 U.S.C. § 7206(1) (subscribing to a false tax return) and 26 U.S.C. § 7206(2) (aiding preparation of a false tax return) merge with their convictions under 26 U.S.C. § 7201 (tax evasion) because all the Internal Revenue Code counts rest on the same two deductions, both taken on the 1986 ADM tax return: the $500,000 accrued for software development and the $316,000 wire transfer to Bourbonia. In response, the government relies on the rule of statutory construction contained in *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (court should inquire "whether each provision requires proof of a fact which the other does not"). As a rule of

statutory construction, however, *Blockburger* does not displace Congress' own design. *See Albernaz v. United States*, 450 U.S. 333, 340 (1981).

The Internal Revenue Code sets out a comprehensive scheme prohibiting and punishing tax fraud; section 7201, the "evasion" provision, has been called the "capstone" of this scheme. *United States v. Helmsley*, 941 F.2d 71, 99 (2d Cir. 1991) (citing *Spies v. United States*, 317 U.S. 492, 497 (1943)), *cert. denied*, 112 S. Ct. 1162 (1992). As the pathmarking opinion explained, under appropriate circumstances, lesser section 7206 offenses merge with the "capstone" prohibition of section 7201:

> [W]here proof of wilfully attempted evasion under § 7201 also proves, *as an incident to the wilful evasion*, the preparing and subscribing of a fraudulent return, the specific form of fraudulent conduct merges into the inclusive fraud charged under § 7201. To cumulate penalties beyond the maximum authorized by § 7201 is, therefore, improper under these circumstances.

United States v. White, 417 F.2d 89, 94 (2d Cir. 1969) (emphasis added), *cert. denied*, 397 U.S. 912 (1970).

The interpretation of congressional intent advanced in *White* has been adhered to in sister circuits. *See Helmsley*, 941 F.2d at 99; *United States v. Kaiser*, 893 F.2d 1300, 1306 (11th Cir. 1990); *United States v. Pulawa*, 532 F.2d 1301, 1302 (9th Cir. 1976).[60] *United States v. Franks*, 723 F.2d 1482, 1486–87 (10th Cir. 1983), *cert. denied*, 469 U.S. 817 (1984), the case emphasized by the government, *see* Government Brief at 176, is not in conflict with *White*. In *Franks*, the charged section 7206 offense involved "[a] misrepresentation of foreign bank account information"; that offense was

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[60] *Cf. Sansone v. United States*, 380 U.S. 343, 349 (1965) (26 U.S.C. §§ 7203, 7207 are lesser included offenses within § 7201 in appropriate cases); *United States v. McGill*, 964 F.2d 222, 239–40 (3d Cir.) (same), *cert. denied*, 113 S. Ct. 664 (1992); *United States v. Doyle*, 956 F.2d 73, 75 (5th Cir. 1992) (same).

"distinct and independent from [the charged section 7201 offense,] an understatement of gross income." *Franks*, 723 F.2d at 1487. The *Franks* court, far from disagreeing with the analysis presented in *White*, explicitly noted, with apparent approval, the government's acceptance and distinction of that precedent. *Id.* at 1486; *accord United States v. Sturman*, 951 F.2d 1466, 1487–88 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 2964 (1992); *cf. Helmsley*, 941 F.2d at 99–101 (counts involving criminal conduct beyond taxpayer's evasion of personal income taxes do not merge).

The government, we note, did not cite, much less distinguish, the leading *White* decision.[61] No cause has been shown for our departure from a precedent so far accepted by sister courts as guiding. We therefore hold that, on the facts here presented, the section 7206 "subscribing" and "aiding preparation of" false return convictions merge, as lesser included offenses, into the "capstone" section 7201 tax evasion convictions.

Given the absence of controlling D.C. Circuit precedent, the trial court correctly submitted the section 7206 and section 7201 counts to the jury. *See, e.g., Garris v. United States*, 491 A.2d 511, 514–15 (D.C. App. 1985) ("Initially permitting convictions on both counts serves the useful purpose of allowing [the appellate] court to determine whether there is error concerning one of the counts that does not affect the other."). We now remand, in view of our acceptance of the *White* analysis, and instruct the district court to vacate the sentences for the section 7206 offenses and to resentence the

[61] The lesser included offense analysis of *White* does not spill over to embrace prosecutions for Internal Revenue Code offenses plus offenses under other statutes with discrete objectives. *Cf. supra* Part V (on coupling tax code and wire fraud convictions); *United States v. Woodward*, 469 U.S. 105, 106–10 (1985) (sustaining convictions, based on same act, under 18 U.S.C. § 1001 for making false statement to agency of United States and under 31 U.S.C. §§ 1058, 1101 for willfully failing to report defendant was carrying over $5000 into the United States).

defendants pursuant to the section 7201 convictions. *See Ball v. United States*, 470 U.S. 856, 864–65 (1985).

Conclusion

For the reasons stated, we affirm all the defendants' convictions and remand with instructions to revise the sentences as required by Part X(F) of this opinion.

It is so ordered.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit
Filed January 8, 1993

No. 91-3228 **September Term, 1992**

United States of America **Criminal No. 90-00027**

v.

David M. Dale,

Appellant

On Appeal From the United States District Court for the District of Columbia

BEFORE: Wald, Ruth B. Ginsburg and Henderson, Circuit Judges

ORDER

Defendants David Dale, Michelle Ashton, Martin Segal, Terence Sweeney and Automated Data Management, Inc. ("ADM") moved before the district court to suppress tape recordings made by government witness David Bowers of telephone conversations between Bowers and ADM officials on the ground that the taping violated Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 211, *codified as amended at* 18 U.S.C. § 2510 *et seq* because Bowers' purpose for taping was to blackmail Dale and Ashton for stock and money and so did not fall within the consensual exception to the general bar against telephone wiretaps. The government responded with three independent arguments: (1) Title III does not apply extraterritorially and therefore is

inapplicable to Bowers' taping in Korea of phone calls to and from the United States: (2) even if Title III applies extraterritorially and Bowers made the tapes for an illegal purpose, Title III does not mandate suppression where the government is the innocent recipient of tapes made by an unindicted coconspirator in the course of criminal activity; and (3) the defendants failed to meet their burden of proving that Bowers' primary purpose in taping was either criminal or tortious because the evidence indicated that his purpose was to protect himself from later allegations that he masterminded ADM's criminal activities in Asia. The district court did not state explicitly why it denied the motion to suppress, explaining only that it had conducted a three-day evidentiary hearing and that "[a]fter careful consideration of the motion, the opposition thereto and the entire record in this case," the motion should be denied. [J.A. at 917]. The defendants did not object to the district court's failure to state its essential findings of fact on the record. *See* Fed. R. Crim. Proc. 12(e)

On appeal, the defendants and the government repeat these same three arguments regarding suppression of the tapes that they made to the district court. Normally, where the district court denies a motion to suppress but fails to make findings of fact on the record, we will sustain the district court's decision "if there is any reasonable view of the evidence that will support it." *Scarbeck v. United States*, 317 F.2d 546, 562 (D.C. Cir. 1962), *cert. denied*, 375 U.S. 856 (1963); *see also United States v. Mitchell*, 951 F.2d 1291, 1299 (D.C. Cir. 1991), *cert denied*, 112 S. Ct. 1976 (1992); *United States v. Caballero*, 936 F.2d 1292, 1296 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 943 (1992); *United States v. Allen*, 629 F.2d 51, 57 (D.C. Cir. 1980). However, we decline to exercise this option here because we have no clue as to which of three separate legal theories advanced by the government the district court adopted and what facts, if any, the district court relied on to support its chosen theory. To exhaust all possibilities that error may have been committed would require an inordinate amount of time and effort on the reviewing court's part. *See United States v. Williams*, 951 F.2d 1287, 1290-91 (D.C. Cir. 1991) (remand to the district court is appropriate where neither the legal reasoning nor factual

findings supporting the denial of a motion to suppress are apparent because it is not clear "[o]ne, that the district court asked the right legal questions in making its ruling; two, that it actually weighed the evidence bearing on the facts needed to answer them").

Therefore, pursuant to our General Rule 15(c), we remand the record to the district court for a clarification of its reasons for admitting the tapes and any relevant factual findings made in support of its admissibility ruling. *See Williams*, 951 F.2d at 1291; *United States v. Jordan*, 951 F.2d 1278, 1283 (D.C. Cir. 1991). This panel will retain jurisdiction over the case in the meantime, and will resolve the other issues on appeal as soon as we receive a clarification of the district court's ruling and reasons in support thereof on the tape issue. Given the need for expeditious processing of criminal cases, we anticipate the district court's reasons will be forthcoming within the immediate future.

Per *Curiam*
For the Court

Ron Garvin
Clerk/rab

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Filed January 21, 1993

UNITED STATES OF AMERICA

v **Criminal No. 90-0027-JGP**

DAVID M. DALE, el al.,

MEMORANDUM ORDER

The defendants appealed their convictions in this case. After oral argument, the Court of Appeals entered an order remanding the case to this Court "for a clarification of its reasons for admitting the tapes and for any relevant factual findings made in support of its admissibility ruling." United States v. Dale, No. 91-3228 (D.C.Cir. January 8, 1993). Earlier in the above order, the Court of Appeals observed that "the district court did not state explicitly why it denied the motion to suppress, explaining only that it had conducted a three-day evidentiary hearing and that '[a]fter careful consideration of the motion, the opposition thereto and the entire record in this case,' the motion should be denied."

Subsequent to the entering the order denying the motion to suppress the tapes, the Court prepared a Memorandum setting the basis of its ruling. It was the Court's understanding that the Memorandum had been filed; it now appears that the Memorandum was not filed. The Memorandum sets forth the reasons the Court for denied the motion to suppress tapes. A copy of the Memorandum was found among Court's papers relating to the case. The copy of the Memorandum has been signed and is attached as Court Exhibit A.

A copy of the Court's Memorandum Order setting forth the basis for the Court's ruling on the Motion to Suppress Tangible Evidence and its Fruits Seized in Search of ADM Offices was also

found within the Memorandum relating to the tapes. While it is the Court's understanding that the Memorandum Order was filed, the Court has signed the copy and attaches the Memorandum Order as Court Exhibit B to insure that it is a part of the court record.[1]

It is hereby

ORDERED that the Clerk of the Court shall file this Memorandum Order, together with the attached exhibits, and thereafter transmit the Memorandum Order and Exhibits A and B to the Court of Appeals.

JAN 15, 1993

JOHN GARRETT PENN
Chief Judge

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[1] It should be made clear that the attached Memorandum and Memorandum Order were prepared by the Court shortly after the entry of the orders denying the relevant motions. Neither document has been modified for the purpose of the instant Order. Both documents have been signed to certify that they represent the grounds for the Court's ruling on the motions.

COURT EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v **Criminal No. 90-0027**

DAVID M. DALE, et al.,

Defendants

MEMORANDUM

The case presently comes before the Court on defendants' Motion to Suppress Illegal Tape Recordings. The Court heard oral argument on the motion and conducted evidentiary hearings on April 25, 30, 1990 and May 1-3, 1990. After careful consideration of the motion and the opposition thereto, the Court concludes that the motion should be denied.

Defendants move to suppress certain tape recordings which the government has indicated that it intends to offer as evidence as trial. Most of the recordings were made by David Bowers ("Bowers") and the rest were made by Charles Roth ("Roth"). Bowers and Roth are former employees of defendant Automated Data Management, Inc. ("ADM"). Bowers is a former vice-president of ADM who was stationed in Korea and responsible for ADM's Asian operations. Consequently, almost all of the Bowers tapes were recorded by Bowers in Korea. Roth also served as an ADM vice-president, but he worked at ADM's Washington, D.C. office. Thus, all of the Roth tapes were recorded by Roth in the United States. In each case, Bowers and Roth were parties to the calls they recorded. The tapes at issue contain telephone conversations that Bowers and Roth individually had with defendants David Dale ("Dale"), Michelle Ashton ("Ashton"), and Terence Sweeney ("Sweeney").

Defendants argue that the tape recordings were obtained in

violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 et seq., and must therefore be suppressed pursuant to the statutory exclusion remedy of Title III.[2] Title III broadly prohibits the interception of any wire, oral, or other electronic communication. Further, Congress enacted a statutory exclusionary rule to render inadmissible in judicial proceedings communications obtained in violation of Title III. 18 U.S.C. § 2525. One exception to this rule involves interception by private individuals. Under Title III, telephone calls may be recorded if one of the parties to the call consents to the recording, unless the recording was made for the purpose of committing a tort or a crime. 18 U.S.C. § 2511(a)(d).

In this case, it is undisputed that all of the tapes are consensual tapes since Bowers and Roth were parties to the communications and, by their act of taping the conversations, gave their consent to the recordings. Defendants claim that Bowers and Roth were stealing and embezzling ADM funds and planned to use the tapes to implement a plan of blackmail and extortion against ADM. Additionally, defendants assert that the tapes were made by Bowers and Roth for the purpose of committing the following torts, among others: invasion of privacy, interference with business and contractual relations, slander, and malicious prosecution. In opposition to the motion the government argues that the recordings were made by Bowers and Roth for perfectly legitimate purposes.

Defendants have the burden of proving the taping was conducted for a criminal or tortious purpose by a preponderance of the evidence. Traficant v. C.I.R., 884 F.2d 258, 266 (6th Cir. 1989); United States v. Truglio, 731 F.2d 1123, 1131 (4th Cir.) cert. denied, 469 U.S. 862, 105 S.Ct. 197 (1984). Having examined the record and heard the testimony of Bowers and Roth at the evidentiary hearing, the Court finds that defendants have failed to establish that the motivation for the taping by either

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[2] The parties dispute whether Title III applies to the Bowers tapes which were made in Korea. For the purpose of this motion, the Court will assume without deciding that Title III applies to all of the tape recordings at issue.

Bowers or Roth was criminal or tortious.

First, the Court will address the recordings made by Roth. Roth testified that his primary purpose for recording conversations he had with Ashton and Sweeney was to pursue his employment compensation claims. Essentially, Roth testified that Dale promised Roth and the other vice-presidents, namely Bowers and Sweeney, that they would have an opportunity to obtain an equity position in ADM if certain events transpired. This agreement was not reduced to writing. Roth further testified that subsequent events and conversations with Dale led him to suspect that ADM would not honor Dale's oral promise. Roth asserted that when he pursued his compensation claim, his employment situation deteriorated to the point that he believed that Dale sought to turn Ashton against him and ultimately terminate his employment. Additionally, he believed that Dale was not acting in the best interests of either ADM or Ashton. Roth decided to tape conversations with the defendants when he heard inconsistent statements from Ashton and Dale regarding his employment status at ADM. He thought the tapes would be a useful mechanism to make a record of these events as they transpired. Ultimately, Roth was terminated by ADM. In contemplation of litigation, he retained an attorney, Ramsey Maupin, who later sent a settlement demand letter to ADM on Roth's behalf.

The Court found Roth's testimony to be entirely credible. Further, the conversations on the tapes themselves and the other documentary evidence presented support his statements. The Roth tapes are replete with conversations in which Roth discusses his employment situation at ADM. During conversations with Sweeney on the tapes, Roth and Sweeney discuss their opinions concerning Dale's promises regarding the vice-presidents obtaining an equity position. Roth also discusses with Sweeney whether Sweeney is willing to join him in pursuing their employment compensation claim. Similarly, Roth's recorded conversation with Ashton concern his position at ADM. These conversations therefore corroborate Roth's assertion that his motivation behind taping was to obtain support for his employment compensation claims.

Moreover, the evidence presented by defendants to support their claim that Roth conspired with Bowers in a blackmail and extortion plan is scant and unpersuasive. For example, defendant's argue that Roth revealed the blackmail scheme to Sweeney during one his calls when he stated: "I have a copy of all those tapes, and we think now is the time to pursue it." This statement was made in the context of a discussion of Roth's employment grievances. In the Court's view, this statement is not at all inconsistent with Roth's testimony. The statement refers to Roth and Bowers pursuing their employment compensation claims rather than any blackmail and extortion plan. Defendants also contend that the settlement demand letter sent to ADM by Roth's attorney demonstrates that Roth's purpose in taping was an attempt to blackmail ADM into paying the amount requested. Again, the content of the Roth tapes belie this contention. Accordingly, the Court concludes that defendants have failed to sustain their burden of proving that Roth had acted with an impermissible purpose in making the recordings.

Next, the Court will consider the Bowers tapes. Bowers testified that while he served as vice-president of ADM he was involved in certain activities that he regarded to be illegal and improper. According to Bowers, it was Ashton and Dale who directed him to conduct the illegal activities. He stated that although he was a willing participant in the illegality in the beginning, there came a time when he became an unwilling participate because he felt that there was a possibility that all of the responsibility for these activities could be placed on him. Bowers stated that he began taping conversations with the defendants at about this time in order to make sure his interests were protected. Specifically, Bowers asserted that with the taping he wanted to make a record which detailed the participation of defendants Ashton and Dale in the criminal activities taking place in Asia and showing that he was receiving directions them from as to those activities. It was important to him that it was clear on the recordings that he was not acting alone since he feared that defendants would seek to portray him in that light.

As in the case of Roth, defendants' argument that Bowers'

motivation behind his taping was illegal or tortious is unconvincing. In short, defendants have failed to meet their factual burden by a preponderance of the evidence. In this regard, they called Bowers as a witness. Not surprisingly, Bowers did not admit that he had an improper motive in making the recordings. Rather, he testified that the purpose of his taping was self-protection. "[M]aking a tape for use in a lawfully self-protective manner is not within the proscription of 18 U.S.C. § 2511(2)(d) because the interception is not done for the purpose of causing injury in the relevant legal sense." United States v. Vest, 639 F.Supp. 899, 907 (D.Mass. 1986), aff'd, 813 F.2d 477 (1st Cir. 1987), cert. denied, 488 U.S. 963, 109 S.Ct. 489 (1988). The Court was not persuaded by defendants' efforts to rebut Bowers' testimony.

Further, defendants sought to impeach Bowers' credibility by presenting evidence on collateral issues. For example, defendants sought to prove that Bowers embezzled funds from ADM. Despite the efforts of defense counsel to impeach Bowers on these and other collateral matters, the Court did not find the testimony of Bowers to be lacking in credibility. Even if defendants could adequately demonstrate that Bowers had stolen money from ADM, this fact alone does not tend to show that he made the tape recordings for improper reasons. Also, the contents of the tapes themselves do not support the defendants' position.

Alternatively, defendants contend that the tape recordings must be excluded from evidence because they were obtained and disclosed in violation of the Federal Communications Act, 47 U.S.C. s 605. For the reasons set forth above with respect to Title III, the Court must also reject this argument.

In view of the foregoing, defendants' motion to suppress illegal tape recordings will be denied. An appropriate Order was entered by the Court prior to trial.

Dated: JOHN GARRETT PENN
UNITED STATES DISTRICT JUDGE

COURT EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v **Criminal No. 90-0027**

DAVID M. DALE, et al.,

Defendants

MEMORANDUM ORDER

I.

In this action, the government has charged defendants Automated Data Management, Inc. ("ADM"), Michelle Ashton ("Ashton"), David Dale ("Dale"), Martin Segal ("Segal") and Terence Sweeney ("Sweeney") with participating in a tax evasion scheme. This case now comes before the Court on defendants' Motion to Suppress Tangible Evidence and its Fruits Seized in Search of ADM Offices. Defendants assert that the search conducted of ADM's offices violated their Fourth Amendment rights because: (1) the affidavit supporting the each warrant contained material false statements and material omissions, made deliberately or with reckless disregard for the truth, which, if considered, would have vitiated probably cause for the search; (2) the search warrant was overbroad in that it failed adequately to specify the items to be seized; and (3) the executing officers conducted an impermissible general search of the ADM offices. The Court heard oral argument on April 25, 1990. After careful consideration of the motion, the opposition thereto and the entire record in this case, the Court concludes that the motion should be denied.

II.

On June 14, 1988, Magistrate Jean F. Dryer authorized a

search warrant for certain records and documents in the offices and warehouses of defendant Automated Data Management, Inc. ("ADM"), located at 1920 Bladensburg Road, N.E., in the District of Columbia. The warrant had issued on the basis of an application and affidavit of Special Agent Heide K. Shintani (hereinafter "Special Agent Shintani" or the "affiant") of the Defense Criminal Investigative Services ("DCIS"). Shintani had been a special agent for three years, first with the Federal Bureau of Investigation ("FBI") and then with DCIS.

In the affidavit, special Agent Shintani states that the search warrant is being sought "in connection with a DCIS investigation of violations of Title 18 U.S.C. Section 286: Conspiracy to defraud the Government with respect to claims; Title 18 U.S.C. Section 287: False, fictitious or fraudulent claims; Title 18 U.S.C. Section 371: Conspiracy (to defraud the government); Title 18 U.S.C. Section 1001: False, fictitious or fraudulent statements; and Title 18 U.S.C. Section 1841: Fraud by mail." Shintani Affidavit at para. 2 The gravamen of the allegations in the affidavit centered on claims of product substitution by ADM with respect to a large Department of Defense contract. Specifically, allegedly ADM (1) without the knowledge or permission of Army contracting officials, (2) improperly substituted less costly and inferior Magna hard disk drives into Wang personal computers, when Wang hard disk drives were the only internal drives permitted under the governing contract, and (3) sent false invoices to the Army charging the contract price for computers which improperly contained Magna drives. The information in the affidavit was obtained from four former ADM employees: namely, David Bowers ("Bowers"), former ADM Vice President in charge of Asian Operations; Charles Roth ("Roth"), another former ADM Vice President; Margo George ("George"), former ADM Director of Accounting, Contracts Manager, and Manager of Special Projects; and Daniel Fitzgerald ("Fitzgerald"), former ADM employee who was in charge of shipping department employees and operations.

On June 16, 1988, the search warrant was executed by Special Agent Shintani and approximately fourteen other law

enforcement officers. Attachment B to the search warrant indicated precisely what records and documents were to be seized by the executing officers,[3] and incorporated by reference the affidavit underlying the search warrant. The officers seized over 125 categories of documents which totaled more than seventy-five boxes of material. The search commenced at 10:00 a.m. and took approximately 10 hours.

III.

A. Entitlement to a Franks Hearing

This motion is before the Court, in part, on the preliminary question of whether the defendant's are entitled to an evidentiary hearing pursuant to Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674 (1978). In Franks, the Supreme Court held that in certain situations, a defendant may go beyond the facial sufficiency of an affidavit supporting a warrant, and challenge the truthfulness of factual statements made therein. The rationale for this rule is clear:

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[3] Attachment B provides:

Based on the information provided by the Confidential Informants and the experience of the affiant, it is believed that the below listed documents are still in ADM's possession. These documents are believed to contain specific information regarding the false statements and claims made by ADM. The property which is to be seized from ADM's premises consist of business records including, but not limited to, any and all claims for payment from the government; DD Forms 250; Army purchase orders; ADM shipping documents; invoices showing deliverables from Wang, Magna, Condor, and Yipkon; payment records to Wang, Magna, Condor, and Yipkon; receipts of payments from the U.S. Army; receipts of rebates from vendors; records reflecting installation of the Magna hard disks; production of assembly records; overseas bank account records; correspondence and memoranda between ADM and Magna, Yipkon, Condor, and Wang vendors; internal documents, including agenda and minutes of board of directors meetings; memoranda pertaining to the substitution of Magna hard disks for Wang and Yipkon hard disks; worksheets and all written directions prepared for assembly technicians; and financial documents submitted to the U.S. Army or the Small Business Administration, and other records which relate to the criminal scheme outlines in the above affidavit. Records to be seized shall relate to the period June 1, 1984 through the present.

> Because it is the magistrate who must determine independently whether there is probable cause, it would be an unthinkable imposition upon his authority if a warrant affidavit, revealed after the fact to contain a deliberately or recklessly false statement, were to stand beyond impeachment.

Id. at 165 (citations omitted). "Where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the find of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request." Id. at 156. "The reasoning of Franks logically extends to material omissions from the affidavit." United States v. Johnson, 696 F.2d 115, 118 n.21 (D.C. Cir. 1982).

Since there is, of course, a presumption of validity with respect to the affidavit supporting the search warrant, defendants are not automatically entitled to a Franks hearing. Franks v. delaware, 438 U.S. at 171. The Supreme Court has set forth the requirements a defendant must satisfy to command an evidentiary hearing.

> There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant.

Id. at 171. Thus, "(t)o mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine." Id. at 171.

To demonstrate materiality, defendants must show that, were the facts omitted from the affidavit brought to the attention of the issuing magistrate and the deliberate or reckless falsehoods removed, the issuing magistrate would not have signed the warrant. See States v. Cole, 807 F.2d 262, 268 (1st Cir. 1986), cert. denied, 481 U.S. 1069, 107 S.Ct. 2461 (1987). Defendants' motion must be denied without a hearing if, after setting aside the allegedly false or misleading statements and adding the allegedly material omissions, "there remains a residue of independent and lawful information sufficient to support probable cause." United States v. Levasseur, 816 F.2d 37, 43 (2d Cir. 1987) (quoting United States v. Ferguson, 758 F.2d 843, 849 (2d Cir.), cert. denied, 474 U.S. 1032 (1985).

"On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing." Franks v. Delaware, 438 U.S. at 172, 98 S.Ct. at 2684-85. Finally, "[i]n the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." Id. at 156.

Defendants' argue that they have made the substantial preliminary showing which entitles them to an evidentiary hearing. Defendants identify several alleged misstatements or omissions which cause, in their view, a Franks violation. Specifically, defendants assert that Agent Shintani (1) falsely mischaracterized Bowers as a confidential informant in the affidavit when in reality he was a target; (2) deliberately or recklessly omitted from the

affidavit the fact that Bowers was not a credible informant; (3) recklessly included in the affidavit false claims that ADM wrongfully engaged in product substitution with respect to the contract; (4) deliberately or recklessly included in the affidavit false claims by Margo George; and (5) deliberately or recklessly excluded from the affidavit material information regarding the bias of the informants. In sum, defendants assert that these deliberate and reckless falsehoods and omissions made by the affiant materially affect the probable cause determination of the search warrant.

1. Challenged Omissions from the Affidavit

In the instant case, the alleged omissions by the affiant do not undermine Magistrate Dwyer's probable cause finding. In this regard, defendants allege that the affiant excluded information regarding the bias of the informants and Bowers' lack of credibility.

Defendants' contention that the affiant's exclusion of information regarding the bias of the informants negates the probable cause finding must be rejected for several reasons. First, defendants make no offer of proof to support their allegation that the informants were biased against the defendants. Franks requires that all allegations be accompanied by a detailed offer of proof, preferably in the form of affidavits. Franks, 438 U.S. at 171, 98 S.Ct. at 2684; United States v. Chesher, 678 F.2d 1353, 1360 (9th Cir. 1982). Other than conclusory allegations, defendants make no effort to satisfy this requirement.

Even assuming that the informants were in fact biased, defendants have not met their burden of showing that the omission was made deliberately or with reckless disregard for the truth. Defendants have not alleged that the affiant was aware of the informants' bias or on notice of this fact. Thus, defendants have not provided the Court with any evidence of the affiant's state of mind. Consequently, their allegations are purely speculative and do not satisfy the requirement for a preliminary showing. See, e.g., United States v. Radtke, 799 F.2d 298, 309-310 (7th Cir. 1986) (defendant's conclusory statement that search warrants based on

information which could not have been legally obtained insufficient to satisfy requirement for preliminary showing when no demonstration that misstatement made deliberately or recklessly).

Finally, the challenged exclusions are not material to the probable cause finding. All four informants are former ADM employees who gained their knowledge from their employment; their statements interrelate with and corroborate each other. Moreover, their statements were given independently. Under these circumstances, the statements of the informants would support a probable cause determination in spite of their possible bad motives. Thus, further disclosure would not have been appropriate or necessary. See, e.g., United States v. Ellison, 793 F.2d 942 (8th Cir.) (failure to disclose that several of the informants were in jail or received financial compensation did not undermine the information or case doubt on the existence of probable cause), cert. denied, 479 U.S. 937, 107 S.Ct. 415 (1986); United States v. Lefkowitz, 618 F.2d 1313, 1317 (9th Cir.) (failure to disclose that informant was defendant's estranged wife with possible bias against the defendant was deemed immaterial), cert. denied, 449 U.S. 824, 101 S.Ct. 86 (1980). For these reasons, the nondisclosure of the informants' possible bias does not require the Court to look beyond the four corners of the facially valid affidavit.

Another omission which defendants challenge as material is the affiant's exclusion of the fact that Bowers was a liar. To support their claim that Bowers was not a credible informant and that the affiant knew or should have known this fact, defendants rely on two investigative reports which they claim the affiant had access to at the time the affidavit was prepared. The first investigative report was prepared by DCIS Special Agent Kenneth Ono following his March 4, 1988 meeting with Bowers. (hereinafter the "first report"). The second investigative report was prepared by FBI Special Agents Don Southerland and Jon Gerloff following their March 13, 1988 meeting with Bowers. (hereinafter the "second report"). Defendants seize upon certain alleged discrepancies in the statements made by Bowers in these two investigative reports to justify a finding that (1) Bowers was not a credible informant, and

(2) the affiant knowingly or recklessly excluded information about Bowers' lack of credibility.

The five claimed Bowers contradictions are as follows. First, defendants argue that Bowers lied about whether there was any financial activity transpiring in Korea. Second, defendants claim that the reports show that Bowers lied about defendant ADM paying off Small Business Association ("SBA") officials to get 8(a) status. The third contradiction alleged is that Bowers lied when he said that Ashton and Dale were paying off friends of General Page and making him offers of employment. Fourth, defendants contend that Bowers lied about Dale having $400,000 in a dummy corporation called Fossano. Finally, defendants allege that Bowers lied when he said that Dale and Ashton had a propensity for violence as Bowers and his family had already been threatened with physical harm.

Upon reviewing the two investigative reports, it is apparent that almost all of the supposed "contradictions" between the reports are easily reconciled. In fact, the only evidence which would be relevant to an assessment of Bowers' credibility are his conflicting statements that Dale and Ashton had threatened him with physical harm. This contradiction will be dealt with below.

The other challenged discrepancies, however, do not support the defendants' contentions since they can be effortlessly harmonized. For example, defendants attempt to make much out of the fact that Bowers allegedly lied in the first report when he indicated that "officials of the Small Business Administration were paid off by [ADM] for the 8(a) status." To support their contention that Bowers lied on this point, defendants rely on the following statements in the second report: "ADM was awarded an $80 million worldwide contract to supply the DEPARTMENT OF DEFENSE, ARMY, with WANG computers. . . . BOWERS was not aware of any kickbacks or bribes made by DALE or ASHTON in the awarding of the contract, as he was employed by ADM after the contract had been awarded. Likewise, BOWERS never had nay subsequent conversations with ASHTON or DALE regarding

kickbacks or bribes during his employment with ADM." The first statement in no way conflicts with the second. According to the first statement, Bowers indicated that ADM paid off the SA officials for its 8(a) status. No mention is made in the first statement of where Bowers acquired this information. By contrast, the second statement makes no reference to how ADM obtained 8(a) status. Instead, the second statement indicated that Bowers stated that he was unaware of any kickbacks or bribes related to award of the $80 million Department of Defense contract. Unless, by some stretch of the imagination, award of this contract is somehow equivalent to obtaining 8(a) status, the alleged contradiction evades this Court. In the second statement, Bowers also indicated that he never communicated with Ashton and Dale regarding kickbacks or bribes during his employment with ADM. This statement is also not at odds with Bowers allegation in the first report that ADM paid off SA officials for its 8(a) status because Bowers clearly could have learned of the alleged SA bribe from persons other than Dale and Ashton. For these reasons, the Court must decline to adopt defendant's strained interpretation that juxtaposition of these two statements reveals that Bowers lied when he said that ADM paid off SA officials for its 8(a) status. Moreover, as stated previously, the remaining alleged discrepancies likewise can be harmonized with little effort and warrant no further comment from this Court. In view of this finding, the discrepancies discussed above do not support a conclusion that the affiant knowingly or recklessly excluded information regarding Bowers credibility from the affidavit supporting the search warrant.

The Court is therefore left with the one inconsistent Bowers' statement which defendants have convincingly established, i.e., the conflicting statements regarding whether Bowers had been threatened with physical harm by Dale and Ashton. Even assuming that this one inconsistency would justify a conclusion that the informant, Bowers, was not credible, the affiant's failure to include this fact is not fatal to the probable cause determination. This is to because Bowers' allegations that ADM was involved in unauthorized product substitution in performance of the Army contract was corroborated by three other ADM employees who were in a position

to have access to the relevant facts. Informants Roth, George, and Fitzgerald each provided independent, consistent, interlocking information on this point. Their allegations are consistent with those made by Bowers, suggesting that Bowers allegations were not mere fabrications. Under these circumstances, Bowers' credibility would have been of no moment. Even if Magistrate Dwyer had rejected Bowers' statements as coming from a source unworthy of belief, she would still be left with the sufficient content in the warrant affidavit to support a finding of probable cause "because the tainted information . . . was merely cumulative evidence of criminal activity . . ." United States v. Grunsfeld, 558 F.2d 1231, 1240 (6th Cir.), cert. denied, 434 U.S. 872, 98 S.Ct. 219 (1977). See United States v. Levasseur, 816 F.2d at 43-44 (omission from affidavit of informant's past criminal activity, drug and alcohol abuse, and psychiatric problems did not taint warrant when independently obtained information was more than enough to support finding of probable cause); United States v. Jones, 801 F.2d 304, 213-14 (8th Cir. 1986) (warrant valid even though affidavit failed to identify all prior bad acts of informant when informant's credibility demonstrated by consensually monitored conversations, chemical analysis, and extensive police monitoring, which provided magistrate with specific facts from which to find informant reliable).

2. Challenged Statements in the Affidavit

Defendants point out three distinct misrepresentations included in Special Agent Shintani's affidavit. In this regard, defendants first challenge paragraph 5 of the affidavit which identifies Bowers as a confidential informant. For the information in paragraph 5, the affiant appears to have relied on the first report, i.e., Special Agent Kenneth Ono's March 4, 1988 interview of Bowers. According to the defendants, the affiant included a deliberately false statement in paragraph 5 that Bowers was a confidential informant when in reality he was a target of the DCIS investigation at that time. Defendants argue that the investigation being conducted by Special Agent Ono out of the DCIS Honolulu Field Office had Bowers as the focus of the investigation at the time of the March 4, 1988 Ono interview. Since defendants have

proffered nothing to support this allegation, they have failed to meet their burden under Franks. In any case, this possible falsehood is largely peripheral to the activities alleged in the affidavit giving rise to probable cause. "An omission of information presented in support of a warrant becomes a concern under Franks only when, to borrow from another area of the law, it is exculpatory. That is, the omitted material, if called to the attention of the judge, would have led to a conclusion that probable cause for the issuance of the warrant was not present." United States v. Hoffman, 677 F.Supp 589, 597 (E.D.Wis. 1988). This is not the effect here. Thus, even assuming the truth of defendants' contentions, the affidavit sufficiently established probable cause.

Secondly, defendants argue that the affiant recklessly included false statements regarding ADM's improper product substitution. The argument here is two pronged. Defendants start with the claim that the informants' claims regarding improper product substitution are false. By way of proof, defendants submit four affidavits signed by certain Army Generals involved in the contracting process. See Declaration of Lt. Co. Charles B. Giasson; Declaration of Duane G. Christensen; and Declaration of Gary L. Swallow. Their declarations state that the relevant Army officials had properly approved ADM's product substitutions. Of course, an allegation that the informants' statements were false is not the showing required under Franks. "'[P]robable cause is not defeated because an informant may have erred or lied, "as long as the affiant accurately represented what was told him."'" United States v. Merchant Diamond Group, Inc., 565 F.2d 252, 253 (2nd Cir. 1977) (citations omitted). See also United States v. Perdomo, 800 F.2d 916. 921 (9th Cir. 1986) (allegations that informant's statements reported in affidavit were false insufficient for Franks hearing because complainant did not challenge veracity of affiant).

Realizing that mere claims of false statements by informants are insufficient to mandate a Franks hearing, defendants next argue that the affiant's failure to have discovered the falsity of the informants' allegations regarding product substitution constitutes "a knowing and reckless disregard for the truth." According to the

defendants, Agent Shintani's failure to undertake rudimentary corroborative investigation was reckless. The corroborative investigation which was lacking in this case, in defendants' view, was the failure to consult these government officials who would have provided the affiant with evidence which would be inconsistent with probable cause. Defendants rely on United States v. Chesher, 678 F.2d 1353, 1360-62 (9th Cir. 1982), for support. In sum, defendants argue that the affiant's failure to investigate further amount to reckless disregard for the truth.

Defendants' argument lacks merit and must be rejected. Even assuming that the challenged omission was material and that it would have caused Magistrate Dwyer to refuse to sign the search warrant, defendants have failed to meet their burden of showing that the statements were made deliberately or with reckless disregard for the truth as required by Franks. "Allegations of negligence or innocent mistake are insufficient." Franks v. Delaware, 438 U.S. at 171, 98 S.Ct. at 2684. Although at this state, "[c]lear proof of deliberate or reckless omission is not required" and "all that is required is that the defendant make a substantial showing that the affiant intentionally or recklessly omitted facts required to prevent technically true statements in the affidavit from being misleading," United States v. Stanert, 762 F.2d 775, 781 (9th Cir. 1985) (citing United States v. Chesher, 678 F.2d 1353, 1362 (9th Cir. 1982)), defendants must provide the court with evidence of the affiant's state of mind. United States v. Davis, 617 F.2d 677, 694 (D.C. Cir. 1979), cert. denied, 445 U.S. 967, 100 S.Ct. 1659 (1980). This standard has been satisfied in cases where courts have found a showing of recklessness. See e.g., United States v. Stanert, 762 F.2d 775 (reckless false statement that suspect had been arrested without mentioning there had been no conviction and reckless omission in stating the affiant investigated a lab blowup at the suspect's residence a year before without mentioning the suspect had purchased and moved into the residence after the explosion); United States v. Davis, 714 F.2d 896 (9th Cir. 1983) (affiant signed statement written in the first person knowing that it would mislead the magistrate into believing the affiant had firsthand knowledge of the fact therein).

The government aptly points out that the defendants have not alleged that Special Agent Shintani ever spoke to the Army generals, or that she knew they existed or had a key role in the procurement decisions of the Army. Clearly, no evidence has been presented that Special Agent Shintani was aware that they Army generals would offer statements controverting probable cause. Under these circumstances, defendants have not shown that the affiant "'in fact entertained serious doubts as to the truth of [her affidavit].'" United States v. Davis, 617 F.2d at 694 (citation omitted). Consequently, her failure to conduct further investigation was not an attempt to mislead the magistrate. Thus, defendants' allegations of deliberate or reckless omission are therefore purely speculative and are not analogous to the conduct at issue in the cases cited above in which courts have found recklessness. See United States v. Richardson, 861 F.2d 291, 294 (D.C. Cir. 1988) (assuming facts in affidavit were false and material, no Franks hearing was required because defendant failed to show that the statements were made intentionally or with reckless disregard for the truth), cert. denied, 109 S.Ct. 1325 (1989).

Moreover, in advancing this argument, defendants misunderstood the standard under which the affiant was operating. Under Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317 (1983), probable. cause for a search warrant merely requires that the magistrate issuing the search warrant merely requires that the magistrate issuing the search warrant determine whether, in light of all the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of crime will be found in a particular place. See United States v. Arenal, 768 F.2d 263, 266 (9th Cir. 1985). Moreover, "[p]robable cause denotes more than mere suspicion, but does not require certainty." United States v. Anton, 633 F.2d 1252, 1254 (7th Cir. 1980). See also United States v. Davis, 617 F.2d at 694. Probable cause therefore does not require an officer to exhaust every possible lead, interview all potential witnesses, and accumulate overwhelming corroborative evidence. In submitting the affidavit to Magistrate Dwyer, the affiant quite realistically believed that sufficient information had been gathered from the four informants to satisfy the probable cause

standard of a search warrant. The magistrate agreed with the affiant and issued the warrant. Thus, it was not necessary for the affiant to further investigate the allegations by confirming them with certain Army officials and her failure to do so does not constitute reckless disregard for the truth. See, e.g., United States v. Miller, 753 F.2d 1475 (9th Cir. 1985) (agents' failure to discover an informant's prior conviction for perjury was negligent, and not reckless, and therefore not Franks error); United States v. Lewis, 592 F.Supp 58, 60 (N.D. Ill. 1984) (defendant's motion, which merely asserted that the government "made no attempt to verify" the accuracy of the confidential informant's statements, alleged negligence against the government agent and was insufficient to justify a Franks hearing). Accordingly, no Franks hearing is required.

Finally, defendants argue that the warrant affidavit falsely reports information supplied by informant Margo George. According to defendants, George has provided information inconsistent with that attributed to her in the Shintani affidavit. The offer of proof submitted by defendants is a declaration from William Corboy, a private investigator retained by defendants. In his declaration, Corboy states that he has interviewed George and that she denied providing any information about ADM to the government. Relying on United States v. Kiser, 716 F.2d 1268, 1273 (9th Cir. 1983), defendants thus argue that the Corboy declaration provides evidence that the affidavit underlying the search warrant contains numerous, material false statements and that Franks hearing is required.

In United States v. Kiser, the issue was under what circumstances a defendant was entitled to a disclosure of the identity of a confidential informant in order to challenge the veracity of search warrant affidavits. In that case, defendant filed a lengthy affidavit from the supposed informant. The court held that a defendant who claims that the affidavit misrepresents or invents information supplied by a confidential informant is, in some instances, entitled to a Franks hearing, but the first set should be an ex parte, in camera hearing to determine whether the individual was, in fact, the informant. If the individual is the informant, the

in camera hearing must be extended since it is merely to determine if the defendant has made a threshold substantial showing of falsehood.

Similarly in cases where the identify of the government informant was known to the defendant, defendants have obtained Franks hearings by submitting affidavits from the informants stating that they did not provide the government with the information ascribed to them. See, e.g., State v. Casal, 103 Wash.2d 812, 699 P.2d 1234 (1985); State v. Walls, 294 S.E.2d 272 (W.Va. 1982); Ramsey v. State, 579 S.W.2d 920 (Tex.Crim.App. 1979). The situation in this case is not comparable to that presented in the cases cited above. In the cases cited above, the defendants submitted statements from the informants themselves relating what, if any, information was provided by them to the government. Here, rather than submitting an affidavit from the informant George, defendants have submitted an affidavit from their investigator in which he states that George denied having made the statements attributed to her. Moreover, defendants have not made any attempt to explain the absence of an affidavit from George herself. The Court declines to extend the holding of United States v. Kiser to encompass declarations or affidavits from persons other than the informant where, as here, the absence of the informant's own affidavit has not been satisfactorily explained. See Franks v. Delaware, 438 U.S. at 171. Accordingly, defendants have not satisfied the substantial preliminary showing requirement of Franks.

B. Particularity and Execution of the Search Warrant

Defendants also argue that the items seized from ADM's offices should be suppressed because the search warrant did not describe the things to be seized with sufficient particularity and the executing officers conducted a general search in violation of the fourth amendment. For the reasons discussed below, the Court find no merit in these arguments.

The fourth amendment requires that a warrant describe with particularity the things to be seized. This requirement aims to

circumscribe the scope of a search or seizure and to safeguard the individual's privacy interest against a "general, exploratory rummaging in a person's belongings." Coolidge v. New Hampshire, 403 U.S. 443, 467, 91 S.Ct. 2022, 2038 (1971). The most frequently quoted statement of these purposes is found in Marron v. United States, 275 U.S. 192, 196, 48 S.Ct. 74, 76 (1927): "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." The particularity requirement also ensures that the magistrate issuing the warrant is fully apprised of the scope of the search and can thus accurately determine whether the entire search is supported by probable cause. See United States v. Spilotro, 800 F.2d 959, 963 (9th Cir. 1986).

The test applied to the description of the items to be seized is a practical one. For this reason, the language in Marron v. United States should not be read literally. It is, perhaps, more accurate to say that the warrant must be sufficiently definite so that the executing officers are able to identify the property to be seized with reasonable certainty. See United States v. Rosario, 820 F.2d 584, 585 (2d Cir. 1987) (per curiam); 2 W. LaFave, Search and Seizure section 4.6(a) (1987). See also United States v. Wolfenbarger, 696 F.2d 750, 752 (10th Cir. 1982) ("A description is sufficiently particular when it enable the searcher to reasonably ascertain and identify the things authorized to be seized.'") (quoting United States v. Wuagneux, 683 F.2d 1343, 1348 (11th Cir. 1982)).

The specificity required in a warrant varies depending on the circumstances of the case and the type of items involved. The fourth amendment generally requires that the government describe the items to be seized with as much specificity as the government's knowledge and circumstances will allow, and "warrants are conclusively invalidated by their substantial failure to specify as nearly as possible the distinguishing characteristics of the goods to be seized." United States v. Fuccillo, 808 F.2d 173, 176 (1st Cir.), cert. denied, 482 U.S. 905, 107 S.Ct. 2481 (1987). Thus, even

warrants that describe items in broad terms or include generic categories of items to be seized are not necessarily invalid if a more precise description of the items sought is not possible. See United States v. Cardwell, 680 F.2d 75, 78 (9th Cir. 1982).

Defendants argue that the search warrant obtained by Special Agent Shintani and authorized by Magistrate Dwyer was extraordinarily broad because it called for seizure of all "business records", including certain records specifically listed. They further contend that the warrant was only constrained by the requirements that the records to be seized relate (1) to the period from June 1, 1984 through the present, and (2) to the criminal scheme outlined in Special Agent Shintani's affidavit. Finally, defendants argue that the latter limitation cannot have the purpose of particularizing the warrant because the affidavit was not incorporated into the search warrant and was not attached to the search warrant.

The government argues in opposition that the warrant was sufficiently particular because it "specified certain documents which were known to exist, and thereafter specified documents by reference to function, topic or as related to the affidavit." Government's Opposition at 14.

The warrant under scrutiny provided for seizure of the following categories of business records: (1) claims for payment from the government; (2) DD Forms 250; (3) Army purchase orders; (4) ADM shipping documents; (5) invoices showing deliverables from Wang, Magna, Condor, and Yipkon; (6) payment records to Wang, Magna, Condor, and Yipkon; (7) receipts of payments from the U.S. Army; (8) receipts of rebates from vendors; (9) records reflecting installation of the Magna hard disks; (10) production of assembly records; (11) overseas bank account records; (12) correspondence and memoranda between ADM, Magna, Yipkon, Condor, and Wang vendors; (13) internal documents, including agenda and minutes of board of directors meetings; (14) memoranda pertaining to the substitution of Magna hard disks for Wang and Yipkon hard disks; (15) worksheets and all written directions prepared for assembly technicians; and (16) financial

documents submitted to the U.S. Army or the Small Business Administration. In addition to this specific list of documents, the warrant authorized seizure of documents related to the criminal scheme outlined in the underlying affidavit. Finally, the warrant was further limited in scope by its date restrictions.

The warrant in question was not unduly broad. The warrant did not call for seizure of all ADM business records. Rather, it narrowed and identified only those documents which were reasonably related to the Magistrate's probable cause findings. For example, the warrant did not broadly call for "all invoices" or "all financial documents" or "all memoranda". It instead specifically required seizure of "invoices showing deliverables from Wang, Magna, Condor, and Yipkon", "financial documents submitted to the U.S. Army and [SBA]," and "memoranda between ADM and Magna." These specifications provided a means whereby the executing officers could distinguish the items to be seized from those that were not. These descriptions are thus not analogous to the non-specific and sweeping descriptions which are found in the cases upon which defendants rely for support in seeking suppression. See, e.g., United States v. Leary, 846 F.2d at 592, 601 (10th Cir. 1988) (reference to documents "relating to the purchase, sale and illegal exportation of materials" in violation of two specified statutes insufficient, as these two statutes "cover a broad range of activity"); United States v. Spilotro, 800 F.2d at 965 (description of "records" which are evidence of violation of any one of 13 statutes insufficient, as some of these statutes "of exceptional scope" and "encompass several separate criminal acts" and government could have described "the items one commonly expects to find on premises used for criminal activities in question"); United States v. Cardwell, 680 F.2d at 77 (in holding affidavit description insufficient, court finds it "flawed because information was available to the government to make the description of the items to be seized more particular"). The records sought relate to the criminal scheme outlined in the affidavit underlying the search warrant. The claims set forth in the affidavit state that ADM engaged in improper product substitution with respect to a contract with the Army. According to the affidavit, the fraud was achieved by substituting

inferior and less costly computer disk drives into Wang personal computers and sending false invoices to the Army. It's clear that these allegations, for which the Magistrate found probable cause, were used to refine the scope of the warrant. The warrant was limited by type and date of record, and to documents related to specific transactions. It therefore did not encompass every conceivable document that ADM might possess. Thus, these limiting features sufficiently narrowed the search such that a general, exploratory search was not authorized. See, e.g., Williams v. Kunze, 806 F.2d 594, 598-99 (5th Cir. 1986) (warrant authorizing seizure of 50,000 to 60,000 documents, constituting majority of business' records, sufficiently particular because it identified eight specific categories of documents involving alleged unlawful tax evasion); United States v. Haimowitz, 706 F.2d 1549, 1557-58 (11th Cir. 1983) (warrant authorizing seizure of voluminous documents from attorney's office in investigation of complex loan fraud scheme sufficiently particular when it described documents by type, by subject matter, and frequently by names of parties who prepared documents or to whom documents addressed), cert. denied, 464 U.S. 1069, 104 S.Ct. 974 (1984).

The Court similarly finds no merit to defendants' argument that a general search was conducted by the officers executing the search warrant. Defendants assert that the search was excessive because it was executed by approximately 15 officers, lasted for about ten hours, and resulted in seizure of seventy-five boxes of materials. Allegations concerning the length of the search or the volume of documents seized, however, are insufficient to establish a constitutional violation. See United States v. Sawyer, 799 F.2d 1494, 1509 (11th Cir. 1986), cert. denied, 479 U.S. 1069,. 107 S.Ct. 961 (1987). Defendants further argue that the executing officers "rummaged through virtually every inch of ADM's offices and warehouse, opening drawers, cabinets, and other storage containers." Defendants' Motion to Suppress at 14. This argument is easily rejected. In searching for documents, the officers would be required to search drawers, cabinets, and other storage areas which might conceivable contain documents. Finally, defendants claim that the search conducted was violative of the

fourth amendment because some of the seized documents were returned to ADM employees after they were reviewed by someone knowledgeable about accounting. Notably, the defendants -- who presumably are in possession of the returned documents -- have not alleged that or demonstrated how the returned documents consisted of material outside of the warrant's parameters. "In searches for papers, it is certain that some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be seized." Andresen v. Maryland, 427 U.S. 4633, 482 n.11, 96 S.Ct. 2737, 2749 n.11 (1976). Likewise, it is probable that seized documents, which fall within the scope of the warrant, may ultimately turn out not to be useful to the prosecution. Cf. United States v. Fawole, 785 F.2d 1141, 1144 (4th Cir. 1986) (seizure of briefcase containing more than 150 separate items did not exceed scope of warrant authorizing seizure of "address books, diaries, business records, documents, receipts [and] warranty books" because such items often found in briefcases; fourth amendment not violated by officer who, as consequence of taking entire briefcase containing some evidence of crime, seized many insignificant, irrelevant items and returned them after making postsearch inventory). It would simply not be practical in all cases for an accountant to conduct on-site review of all documents seized to ensure that leach document is ultimately necessary to the government. Clearly, subsequent review of the seized documents by the governments' consultants or experts is not unreasonable, especially where, as here, defendants have not argued that the returned documents fell outside the scope of the warrant. Accordingly, the Court must reject defendants' argument that the search conducted exceeded the scope of the warrant.

Accordingly, it is hereby

ORDERED that defendants' motion to suppress tangible evidence and its fruits seized in search of ADM offices is denied.

Dated:

JOHN GARRETT PENN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Filed August 14, 1991

United States of America

v.

David M. Dale, et al.

Criminal No. 90-27

Decided and Filed
on August 14, 1991

Reported at
782 F. Supp. 615

MEMORANDUM

JOHN GARRETT PENN, District Judge.

I. Introduction

Defendants Automated Data Management, Inc. ("ADM"), David M. Dale ("Dale"), Michelle Ashton ("Ashton"), Terrence Sweeney ("Sweeney"), and Martin Segal ("Segal") are charged in a ten count Indictment with conspiracy,[4] subscribing to and aiding and assisting in the preparation and presentation of false and fraudulent tax returns,[5] attempted tax evasion,[6] wire fraud,[7] false statements,[8] concealing facts by trick, scheme and artifice,[9] and aiding and

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[4] 18 U.S.C. § 317.

[5] 26 U.S.C. §§ 7206(1), (2).

[6] 26 U.S.C. § 7201.

[7] 18 U.S.C. § 1343.

[8] 18 U.S.C. § 1001.

[9] 18 U.S.C. § 1001.

abetting.[10] In short, the Indictment alleges that defendants participated in a scheme whereby they created and used overseas companies under their control for tax evasion purposes. This case presently comes before the Court on a number of motions filed by defendants: (1) Defendants' Motion to Dismiss Count One; (2) Defendants' Motion to Dismiss Count Two; (3) Defendants' Motion to Dismiss Count Five; and (4) Defendants' Motion to Dismiss Counts Six through Ten. Each of these motions will be addressed in turn.

II. Motion to Dismiss Count One

Count One charges all defendants with conspiracy to defraud the United States and to commit substantive offenses against the United States. It charges a single conspiracy to defraud the United States by impeding, impairing, obstructing and defeating the functions of the Internal Revenue Service in the assessment and collection of income taxes, and to commit the following substantive offenses against the United States: (1) tax evasion in violation of 26 U.S.C. § 7201; (2) subscribing to a false tax return and aiding and abetting the preparation of a false tax return in violation of 26 U.S.C. §§ 7206(1), (2); and (3) making false statements to and concealing material facts by trick, scheme and device from the Internal Revenue Service, the Small Business Administration and the Department of Defense in violation of 18 U.S.C. § 1001. The conspiracy statute provides, "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, . . . each shall be fined . . . or imprisoned . . . or both." 18 U.S.C. § 371 (emphasis added).

Defendants move to dismiss as duplicitous the conspiracy count, since it charges the defendants with conspiracy under both the "specific offenses" clause and under the "defraud" clause of § 371. Defendants argue that a count which alleges violation of both clauses of the conspiracy statute violates Rule 8(a) of the Federal

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[10] 18 U.S.C. § 2.

Rules of Criminal Procedure because it charges two separate offenses. Defendants further argue that Count One subjects them to the risk of conviction by less than a unanimous jury, and fails to adequately inform them of the real charges. Alternatively, defendants move to strike the defraud language from the indictment as surplusage.

Duplicity is the joining of two or more offenses in a single count. See Fed.R.Crim.P. 8(a). This circuit has already decided that a violation of both prongs of § 371 may be alleged in a single count of an indictment without charging more than one offense. See May v. United States, 84 App. D.C. 233, 175 F.2d 994 (D.C. Cir.) (affirming conviction of a United States Congressman who had been charged in a single count with conspiracy to defraud the United States and to commit specified substantive offenses), cert. denied, 338 U.S. 830, 70 S.Ct. 58, 94 L. Ed. 505 (1949). In May, the court reasoned that "neither a multiplicity of objects nor a multiplicity of means converts a single conspiracy into more than one offense." Id. at 1002 (footnote omitted). This rule is consistent with Supreme Court precedent: "The allegation in a single count of a conspiracy to commit several crimes is not duplicitous, for 'The conspiracy is the crime, and that is one, however diverse its objects.'" Braverman v. United States, 317 U.S. 49, 54, 63 S.Ct. 99, 102, 87 L. Ed. 23 (1942) (quoting Frohwerk v. United States, 249 U.S. 204, 210, 39 S.Ct. 249, 252, 63 L. Ed. 561 (1919)). Thus, "since the law of conspiracy allows for schemes with more than one object, the fact that a count may allege conspiracy both to commit offenses against the United States and to defraud the United States does not necessarily make that count duplicitous." United States v. Recognition Equipment, Inc., 711 F. Supp. 1, 7 (D.D.C. 1989) (emphasis in original) (citing United States v. Treadwell, 245 App. D.C. 257, 760 F.2d 327, 335-36 (D.C. Cir. 1985), cert. denied, 474 U.S. 1064, 106 S.Ct. 814, 88 L. Ed. 2d 788 (1986)).

Recent decisions from other jurisdictions have also considered whether a single count charging a conspiracy to defraud the United States and to commit substantive offenses violates the rule against duplicity; they have followed the May reasoning and held likewise.

See, e.g., United States v. Smith, 891 F.2d 703, 711-13 (9th Cir. 1989) (indictment charging conspiracy to defraud United States and to commit substantive offenses in single count was not unconstitutionally duplicitous; two clauses of section 371 establish alternate means of commission rather than two distinct conspiracy offenses); United States v. Williams, 705 F.2d 603, 623-24 [**6] (2d Cir.), cert. denied, 464 U.S. 1007, 104 S.Ct. 524, 78 L. Ed. 2d 708, 104 S. Ct. 525 (1983) (rejecting appellants' duplicity claim where indictment charged in a single count conspiracy to defraud the United States and to commit substantive offenses); United States v. Berlin, 707 F. Supp. 832, 836 (E.D.Va. 1989) (rejecting duplicity argument, relying on May). See also United States v. Treadwell, 760 F.2d at 336 ("[A] single conspiracy may contemplate . . . the violation of one or more federal statutes in addition to defrauding the United States."). Thus, despite its age, May remains good law and retains current vitality.

Defendants nevertheless invite this Court to reconsider the May holding in light of the statutory interpretation of § 371 in United States v. Minarik, 875 F.2d 1186 (6th Cir. 1989). Defendants also rely on United States v. Haga, 821 F.2d 1036, 1039 (5th Cir. 1987) and United States v. Thompson, 814 F.2d 1472, 1477 (10th Cir.), cert. denied, 484 U.S. 830, 108 S.Ct. 101, 98 L. Ed. 2d 61 (1987) in urging a re-evaluation of May.

At the outset, it is worth mentioning that none of the cases cited by defendants dealt with the duplicity argument presently before this Court. In Minarik, the defendant was not charged under both prongs of the conspiracy statute. The one-count indictment charged the defendant with willfully conspiring "to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Department of the Treasury." Minarik, 875 F.2d at 1188. The defendant was convicted although at trial the government proved only the existence of a conspiracy to violate a specific statute, 26 U.S.C. § 7206(4). The Sixth Circuit affirmed the district court's order granting the defendant's motion for judgment notwithstanding the verdict, since the defendant had not been charged with the offense prong of § 371, on the ground that the

proof was at variance with the indictment.

The court reasoned that "the 'offense' and 'defraud' clauses as applied to the facts of this case are mutually exclusive, and the facts proved constitute only a conspiracy under the offense clause . . . ." Id. at 1187. Throughout the period from the return of the indictment through the trial, the government's theory of the case had evolved; the court found these theories to be "significantly dissimilar" resulting in the presence of confusion. Id. at 1189. The court further felt that the divergence between the defendants' duty under the specific offense clause and that assumed by their indictment under the defraud clause of § 371 generated unnecessary and avoidable confusion. Id. at 1195. "Such confusion in a criminal prosecution is not permissible when an indictment for conspiracy to commit the offense . . . would have provided all the clarity that was missing." Id. Consequently, the Court held that conspiracies to commit specific offenses should be prosecuted exclusively under the offense clause of § 371 rather than under the defraud clause in order to avoid unnecessary confusion. Id. at 1194. The court, however, appears to limit this holding to situations where a Congressional statute closely defines those duties of a citizen which are "technical and difficult to discern". Id. at 1196.

United States v. Haga similarly involved a situation where the court found there was a fatal variance between the indictment and the proof of the conspiracy; the prosecution charged under the offense clause of § 371, but the proof at trial supported a conviction on the defraud clause. Although no duplicity argument was advanced or addressed by the court, it stated, "Count I must have charged a conspiracy either to 'commit any offense' or to 'defraud the United States'; it cannot have charged both." United States v. Haga, 821 F.2d at 1043 (emphasis in original).

Finally, in United States v. Thompson, the court was presented with a double jeopardy claim by a defendant who had first been charged with conspiracy to commit mail fraud and later charged with conspiracy to defraud the United States. The court held that the crimes were distinct since each requires proof of an element which

the other does not, and permitted the subsequent prosecution. Id. at 1477. Again, the court was not presented with a duplicity argument.

Defendants contend that Minarik, Haga and Thompson hold that the defraud and offense clauses of § 371 constitute two separate offenses such that an indictment which charges, in a single count, a conspiracy to violate both prongs of the statute cannot stand. Additionally, defendants argue that Minarik interprets § 371 to require the government to indict either for a conspiracy to defraud the United States or for a conspiracy to commit specific offenses, for any given course of alleged criminal conduct. According to defendants, Minarik further holds that where there is a specific criminal statute covering the course of action complained of, the government is obliged to charge a conspiracy to commit that offense. Conversely, under Minarik the government would be allowed to charge a conspiracy to defraud the United States only in circumstances where there is no federal criminal statute which covers the complained of activity. Relying on Minarik, defendants thus argue that the government's theory of this case only supports the allegation that defendants conspired to commit offenses against the United States. As gleaned from the indictment and as described in the government's response to defendants' motion for a bill of particulars, defendants assert:

> That both of the conspiracy charges in count 1 are based on the same course of conduct conducted in order to accomplish the same goal, that is, the government is arguing in this case that what occurred was these defendants caused money to be transferred overseas to foreign corporations related to their corporation in the United States; that they made personal use of some of those funds; and then the purpose of these transactions was to defraud the government of revenues properly due from those transactions.

Tr. at 147.[11] Indeed, the government has categorically stated that its theory of the case is that the defendants created and used overseas companies under their control for three means of tax evasion. Government's Opposition to Defendants' Motion for a Bill of Particulars at 1. Defendants argue that there are substantive statutes which amply cover the alleged wrongful conduct; i.e., tax evasion, filing of false returns and making false statements to government agencies. Defendants thus apply their analysis of Minarik to conclude that, under these circumstances, the government's conspiracy allegations must be grounded on the offense prong of the conspiracy statute. Moreover, defendants argue that the government was wrong to charge a conspiracy to defraud since this charge only reaches conspiracies to engage in certain fraudulent conduct not otherwise prohibited by federal law. Finally, defendants assert that the charging language in the Indictment regarding defrauding the United States is confusing and exposes the defendants to the unconstitutional risk of a conviction by a less than unanimous jury.

In the Court's view, Minarik, Haga, and Thompson do not require dismissal of the conspiracy count on grounds of duplicity. The Court reaches this conclusion for several reasons. First, defendants erroneously read Minarik to state that § 371 creates two separate offenses. In fact, Minarik affirmatively cites precedent, including May, for the proposition "that § 371 creates one crime that may be committed in one of two alternate ways." Minarik, 875 F.2d at 1193 (emphasis in original). The Minarik court found this conclusion to be "entirely consistent with the rule requiring courts to give penal statutes a narrow interpretation." Id. Moreover, to the extent that Haga and Thompson imply that § 371 creates two separate conspiracy offenses, they are rejected. See United States v. Smith, 891 F.2d at 712.

Additionally, Minarik does not broadly decide that § 371 creates two mutually exclusive ways of proceeding with a conspiracy

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[11] Tr. refers to the transcript of the Motions Hearing held on April 25, May 1-2, 1990.

charge, as defendants contend. Rather Minarik must be limited to its facts, especially since the court specifically held that "the 'offense' and 'defraud' clauses as applied to the facts of this case are mutually exclusive." Id. at 1187. Minarik dealt with a situation where the factual allegations in the indictment and the evidence adduced at trial only showed that defendants conspired to commit a specific offense; it clearly does not consider the possibility that any given course of alleged criminal conduct might encompass a conspiracy both to commit offenses specifically defined elsewhere in the federal criminal code and to defraud the United States. As such, it does not support defendants' contention that an indictment may not properly charge in a single count a conspiracy to commit offenses and to defraud.

Finally, even if the Court were to accept defendants' interpretation of Minarik, this interpretation does little to advance their duplicity claim. In short, defendants argue that Minarik requires the government to charge a conspiracy under the "offense" clause where there is a specific federal crime covering the alleged wrongful conduct, and permits the government to charge a conspiracy under the "defraud" clause only where there is no federal crime that covers the alleged wrongful conduct. In defendants' view, since the alleged wrongful conduct in this case is amply proscribed by federal criminal statutes, the government should not be permitted to charge them under both prongs of § 371, or even under the defraud clause standing alone. This interpretation of § 371 is only tangentially related to defendants' duplicity claim and, consequently, does little to advance it. For these reasons, defendants' duplicity argument must be rejected.

Although they characterize their motion as a duplicity challenge, defendants' attack on Count One should more appropriately be viewed as a challenge, pursuant to Minarik, to the Indictment's conspiracy to defraud language on grounds that there exist criminal statutes which define defendants' duties such that only a conspiracy to commit these offenses should be plead. Accordingly, the Court will turn now to defendants' alternative request; that the court strike as surplusage the defraud language from Count One. Defendants

contend that the government will use the same evidence to seek to prove both objects--i.e., defrauding the government and violating specific offenses--of the conspiracy. The government does not appear to dispute this contention. On this point, the government argues that using the same evidence to establish at trial alternate means of committing the single conspiracy is not an impermissible charging mechanism, even if it has the effect of giving the jury two bites at the apple.

Insofar that Minarik holds that the government may not charge a conspiracy to defraud in lieu of a conspiracy to commit specific offenses when "it is clear that Congress has specifically considered a given pattern of wrongful conduct and enacted a specific statute with a specific range of penalties to cover it," Minarik, 875 F.2d at 1193, this Court will follow that well-reasoned approach. We agree that under those circumstances the differing legal duties presented and the possibly resulting variance between charge and proof will create unacceptable confusion. The instant case is distinguishable, however, because the government has charged under both prongs of the conspiracy statute. The government will seek to prove that defendants' actions violated both the duties of the defraud clause and the duties of the offense clause. In so doing, the government must define precisely what duties the defendants were under and how defendants breached those duties. This situation does not implicate the concerns about divergence and confusion which form the basis for the Minarik decision. In Minarik, the court noted that the government's "changing theories presented defendants with a moving target as they attempted to prepare their defense." Id. at 1189. It is unlikely in this case that the Court, defendants and the jury will be presented with changing legal theories. Rather, it is expected that the government will [illegible] as it defrauding the government and committing specified offenses--the defendants violated § 371. There is no reason to suspect that this will be confusing or unfair. Moreover, merely because the government will use the same evidence to establish both objects of the conspiracy does not make it so. Accordingly, defendants' request to strike as surplusage the defraud language in count one is denied.

III. Motion to Dismiss Count Two

Defendants ADM and Dale move to dismiss Count two on grounds that it does not apprise them of the charges against them with the specificity required by the Sixth Amendment and because the provisions of 26 U.S.C. § 7206(1) are so vague as to deny due process. Count Two of the Indictment charges ADM and Dale with making false statements under the penalties of perjury on a United States corporate income tax form in violation of 26 U.S.C. § 7206(1), often referred to as "tax perjury." See, e.g., United States v. Doan, 710 F.2d 124 (3rd Cir. 1983); see also Kolaski v. United States, 362 F.2d 847, 848 (5th Cir. 1966) (The gist of the offense of perjury, under both the general perjury statute and the internal revenue perjury statute, is a false statement, wilfully made, of material matter.) Defendants themselves have referred to § 7206 as the "tax perjury statute." Tr. at 151. Section 7206(1) provides in pertinent part:

Any person who -- (1) Declarations under penalties of perjury.-- Wilfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every matter; . . . shall be guilty of a felony. . . .

Count Two of the Indictment tracks the statutory language of § 7206(1); it charges that defendants ADM and Dale did: "wilfully make and subscribe a United States Corporate Income Tax Return . . . which was verified by a written declaration that it was made under the penalties of perjury . . . which said return [ADM and Dale] did not believe to be true and correct as to every material matter . . . ."

The Court finds that neither of the grounds asserted by defendants warrant dismissal of Count Two. First, the defendants' contention that Count Two suffers from a lack of specificity is groundless. In order to meet the requirements of the Sixth Amendment, an

indictment must contain every element of the offense charged and must fairly apprise the accused of the conduct allegedly constituting the offense so as to enable him to prepare a defense against those allegations. United States v. Ramos, 666 F.2d 469, 474 (11th Cir. 1982) (citing Hamling v. United States, 418 U.S. 87, 117, 94 S.Ct. 2887, 2907, 41 L. Ed. 2d 590 (1942)). "It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.'" Id. (quoting Hamling v. United States, 418 U.S. at 117, 94 S.Ct. at 2907). As shown previously, the language contained in Count Two tracks the language of § 7206(1). Moreover, as the government correctly asserts, Count Two also sets forth those matters which are alleged to constitute the false statements. The Court finds that the Indictment's tracking of the statutory language, supplemented by specific allegations of the alleged false statements which make up the charge, are sufficient to satisfy the level of specificity required by the Sixth Amendment.

Defendants nevertheless complain that Count Two lacks specificity because it refers to declarations made "under the penalties of perjury" and, in their view, the offense described by § 7206(1) is an offense other than perjury. According to defendants, it is reasonable to infer from the legislative histories of § 7206(1) and the general federal perjury statute, see 18 U.S.C. § 1621, that the offense described by § 7206(1) of the Internal Revenue Code is not a species of the perjury statute. Defendants draw this puzzling inference from the fact that the penalties for making false statements on tax returns have been penalties peculiar to the Internal Revenue Code since 1954. Regardless of any variance in penalties between the tax perjury statute and the general federal perjury statute, the plain language of the tax perjury statute makes clear that it is designed to punish perjury. Accordingly, the Court must reject defendants rather strained interpretation of § 7206(1).

Defendants second argument, which also relies on this interpretation of § 7206(1), similarly has no merit. Defendants argue

that § 7206(1) is void for vagueness because it does not apprise defendants as to what conduct they must avoid in order to escape liability under the provisions of the statute. Defendants contend that § 7206(1) is misleading because it suggests that a false declarer will be prosecuted under the provisions of the federal perjury statute rather than § 7206(1). In defendants view, § 7206 does not include a definition of the conduct which will trigger criminal liability under its provisions since § 7206 proscribes conduct other than perjury. The Court has already rejected this argument and need not discuss it further. Moreover, a plain reading of § 7206(1) reveals that there is nothing vague or misleading about its terms. Accordingly, defendants' motion to dismiss Count Two on grounds of vagueness and lack of specificity will be denied.

IV. Motion to Dismiss Count Five

Defendants ADM, Dale, Ashton, and Sweeny move to dismiss Count Five of the Indictment. Count Five charges these defendants with wire fraud in violation of 18 U.S.C. § 1343. Count Five alleges that as part of a scheme to "defraud the United States of tax revenues by means of false and fraudulent representations in United States tax returns" the defendants caused $ 316,000 to be transferred by wire from ADM's Washington, D.C. bank account to the designated Swiss bank account of a Swiss investment company named Bourbonia as payment for consulting work. The Indictment further alleges that Bourbonia had not in fact performed consulting work for ADM and that a portion of the $ 316,000 was later transferred to a company controlled by defendants. The purpose of this scheme, according to the government, was to permit ADM to take a phony tax deduction on its 1986 corporate income tax return.

The $ 316,000 wire transfer and its treatment on ADM's 1986 corporate income tax return also serve as factual bases for those counts of the Indictment which allege violations of the federal criminal income tax laws. In Count Two, ADM and Dale are charged with subscribing to a false return in violation of 26 U.S.C. § 7206(1). Count Three charges Ashton, Sweeney, and Segal with

aiding and abetting in the preparation and presentation of a false and fraudulent return in violation of 26 U.S.C. § 7206(2). Finally, all defendants are charged in Count Three with attempted tax evasion in violation of 18 U.S.C. § 2 and 26 U.S.C. § 7201.

These defendants contend that Count Five must be dismissed for two reasons. First, defendants rely on United States v. Henderson, 386 F. Supp. 1048 (S.D.N.Y. 1974), which broadly held that Congress did not intend to apply the federal mail fraud statute to a scheme to defraud the United States of tax revenues by evading the payment of income taxes. The issue presented appears to be one of first impression in this circuit. In Henderson, the defendant was charged with three counts of mail fraud along with basic income tax evasion counts in connection with a tax evasion scheme involving inflated deductions for charitable donations. Two of the mail fraud counts stemmed from mailing the tax returns during the tax years at issue. The third count was based upon a letter mailed by the defendant to the donee in which the defendant proposed the donation and overvalued the property at issue. The Henderson court dismissed the mail fraud counts finding that they were being used impermissibly in an attempt to pyramid sentences in the event of a conviction, since they were "bottomed on essentially the same allegations as those required to sustain the tax evasion and perjury counts brought under the appropriate provisions of the Internal Revenue Code[.]" Id. at 1054. Defendants thus urge the Court to adopt the reasoning in Henderson and apply it to the instant action.

This Court must decline defendants' invitation to apply the holding of Henderson to the wire fraud charge in this case. It is patently clear to this Court that there is little support for the Henderson decision, even in the circuit from which it arose. In United States v. Regan (Regan II), 713 F. Supp. 629 (S.D.N.Y. 1989), a recent case decided in the same district as Henderson, the court rejected defendants' claim that they could not be indicted under the mail and wire fraud statutes for attempting to defraud the United States of income tax revenue. Id. at 635. In so holding, the court refused to follow Henderson. The Regan II court reviewed the bases underlying the Henderson decision and found that they were

either inapplicable or no longer persuasive rationales. Id. at 635.

After conducting an exhaustive review of the relevant case law, the Regan II court further explained that Henderson has been rejected or distinguished in virtually all of the reported cases that cite the opinion. Id. at 634-35 (collecting cases). While it is not necessary to re-examine each of these decisions, it is worth mentioning that the Second Circuit has questioned and rejected Henderson in cases involving distinguishable fact patterns, decisions in the Southern District of New York have disapproved of the Henderson approach, and other circuits have refused to follow Henderson. See, e.g., United States v. Computer Sciences Corp., 689 F.2d 1181, 1187 n.13 (4th Cir. 1982), cert. denied, 459 U.S. 1105, 103 S.Ct. 729, 74 L. Ed. 2d 953 (1983); United States v. Mangan, 575 F.2d 32, 49 (2d Cir.), cert. denied, 439 U.S. 931, 99 S.Ct. 320, 58 L. Ed. 2d 324 (1978); United States v. Miller, 545 F.2d 1204, 1216 n.17 (9th Cir. 1976), cert. denied, 430 U.S. 930, 97 S.Ct. 1549, 51 L. Ed. 2d 774 (1977); United States v. Standard Drywall Corp., 617 F. Supp. 1283, 1295-96 (S.D.N.Y. 1985). Despite this backdrop, defendants have notably made no effort to distinguish the instant case from the multitude of cases which reject or criticize the Henderson holding. More importantly, defendants have cited no cases which follow the Henderson ruling. The government thus correctly states that Henderson stands alone for the proposition that the mail fraud statute was not intended to reach the crime of tax evasion. In view of the overwhelming authority which stands at odds with the approach taken in Henderson and defendants' failure to distinguish the instant case from that authority, this Court is reluctant to embrace its broad ruling.

The second argument advanced by defendants in support of their motion to dismiss Count Five is that a scheme to defraud the United States of tax revenue does not constitute a scheme to deprive the government of "property", within the meaning of McNally v. United States, 483 U.S. 350, 107 S.Ct. 2875, 97 L. Ed. 2d 292 (1987). In McNally, the Supreme Court held that the mail fraud statute is "limited in scope to the protection of property rights," and does not reach "schemes to defraud citizens of their intangible rights

[*624] to honest and impartial government." Id. at 355, 107 S.Ct. at 2879. Defendants argue that the tax revenue at issue cannot be considered tangible property rights because the United States does not have a property right in the income of a taxpayer prior to assessment. In reaching this conclusion, defendants provide a thorough discussion of the administrative and judicial hoops through which the government must jump to collect on taxes. According to defendants, the Internal Revenue Service has no right of any kind with respect to any deficiency in taxes until a tax return is filed, a deficiency has been determined, and the taxpayer has been notified. Since this process indisputably has not taken place with respect to the tax revenues at issue, defendants insist that the government does not have a tangible property right to this money within the meaning of McNally.

Citing Regan II in support, the government contends that the defendants' alleged scheme to defraud the government of money falls squarely within McNally. Regan II is very similar to the factual situation herein. In Regan II, defendants were charged with conspiracy, RICO charges, mail and wire fraud, securities fraud, and subscribing to and aiding and assisting in the preparation and presentation of false and fraudulent tax returns. They similarly argued that "no plan to defraud the United States of money or property can be alleged in connection with their alleged tax trading scheme, because the federal government has no property right in a taxpayer's income until a notice of tax deficiency is sent to the taxpayer." Id. at 633. Thus, in Regan II, the district court was confronted with the precise argument which is presently before this Court.

Taking a common sense approach to defendants' claim therein, the Regan II court soundly rejected the proposition that since the tax had yet to be assessed or determined, the government had no "tangible right" to the property. The court stated:

> An attempt fraudulently to hide income from the government in order to pay less taxes than is legally due is a scheme to defraud the government of

> money. Defendants' effort to obscure this common sense reality by focusing their argument on the administrative steps which the Internal Revenue Service must follow to collect taxes due is quite frankly a waste of time.

The same conclusion has been uniformly reached by other courts that have addressed this issue. See, e.g., United States v. Bucey, 876 F.2d 1297, 1309 (7th Cir. 1989); United States v. Doe, 867 F.2d 986, 988-989 (7th Cir. 1989); United States v. Porcelli, 865 F.2d 1352 (2nd Cir.), cert. denied, 493 U.S. 810, 110 S.Ct. 53, 107 L. Ed. 2d 22 (1989); United States v. Herron, 825 F.2d 50, 57 (5th Cir. 1987). This Court is in agreement with the preceding line of cases. Accordingly, defendants' motion to dismiss Count Five is denied.

V. Motion to Dismiss Counts Six through Ten

Finally, defendants ADM, Dale and Ashton move pursuant to Fed.R.Crim.P. 12(b) to dismiss Counts Six through Ten of the Indictment on grounds that these counts fail to state an offense against the United States. "An indictment that fails to allege each material element of an offense fails to charge that offense." United States v. London, 550 F.2d 206, 211 (5th Cir. 1977). Counts Six through Ten charge these defendants with violating 18 U.S.C. § 1001--the "false statement" statute--by failing to disclose material facts and making false statements on forms they submitted to the Department of Defense. The specific allegations of these counts are as follows. Counts Six and Seven allege that Ashton and Dale, on behalf of ADM, intentionally failed to disclose, on their respective "Personnel Security Questionnaires", that they owned and had business connections with Shaffham, Ltd., a Hong Kong company, and Gemona Ltd., a Hong Kong company, in response to a question which asked: "Do you have any foreign property or business connections or have you ever been employed by or acted as a consultant or representative for a foreign government, firm or agency?". Counts Eight and Nine similarly allege that Ashton and Dale, on behalf of ADM, intentionally failed to disclose their

ownership of and business connections with these Hong Kong companies in documents entitled "Statement of Full Disclosure of All Foreign Connections", which documents required that all foreign connections be disclosed. Count Ten charges ADM, Ashton and Dale with falsely answering "no" to the question "Does your organization have interlocking directors with foreign interests?" in a document entitled "Certificate Pertaining to Foreign Interests."

Defendants set forth four reasons why Counts Six through Ten of the Indictment are legally insufficient. First, defendants argue that neither the facts alleged to have been concealed in Counts Six through Nine nor the false statements alleged in Count Ten are material as a matter of law. Additionally, defendants contend that Counts Six through Nine fail to sufficiently allege the "trick, scheme, or device" by which the facts were allegedly concealed. Moreover, defendants assert that Count Ten fails to state an offense under 18 U.S.C. § 1001 because the alleged false statement in that count is not false as a matter of law. Finally, defendants argue that Counts Six through Ten do not state an offense since the false statements and concealed facts alleged in these counts fall within the "exculpatory no" doctrine. Each of defendants' arguments will be addressed in turn.

a. Materiality

The documents that form the basis for Counts Six through Ten of the Indictment were submitted to the Department of Defense in connection with the defendants' application for a security clearance. Defendants contend that the alleged false statements and concealed facts on these forms are not material as a matter of law.

The Court finds that the statements at issue are material. This Circuit has described the materiality requirement as follows:

> The test of materiality is whether the statement "has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a [particular] determination." Proof of actual

> reliance on the statement is not required; the Government need only make a reasonable showing of its potential effects.

United States v. Hansen, 249 App. D.C. 22, 772 F.2d 940, 949 (D.C. Cir. 1985) (quoting United States v. Diggs, 198 App. D.C. 255, 613 F.2d 988, 999 (D.C. Cir. 1979), cert. denied, 446 U.S. 982, 100 S.Ct. 2961, 64 L. Ed. 2d 838 (1980)), cert. denied, 475 U.S. 1045, 106 S.Ct. 1262 (1986). The agency's purpose in its security clearance inquiry, in defendant's view, is to ensure that classified information is only released to those persons and entities who do not pose a security risk. Thus, defendant's argue, the inquiries about "foreign connections," "foreign interests," and "foreign businesses" are directed toward determining whether an individual or a facility would pose such a risk because they were under the influence of a foreign national or an entity controlled by foreign nationals whom are enemies of the United States. Here the falsifications related to defendants' ownership of foreign corporations. As such, they "pertain[] specifically to the area the [Department of Defense] is charged to investigate." Id. at 950. Clearly, had the defendants told the investigators that they owned the Hong Kong corporations, the investigators would have been prompted to take additional steps and make inquiries into the nature of the businesses to determine if they were a security risk to the United States. Thus, the information had a "natural tendency to influence" the government function. Moreover, defendants' contention that the information would not and could not have had any effect upon the government's decision to grant a security clearance because the corporations are owned entirely by American citizens is not relevant to the materiality issue. By this claim, defendants apparently seek to have the Court determine materiality on the basis of whether the Department of Defense would have granted the security clearance if defendants' ownership of the Hong Kong corporations had been revealed. Materiality, however, is not concerned with whether the alleged omission would have affected the ultimate agency determination. Thus, similar challenges to materiality have been rejected. See, e.g., United States v. London, 550 F.2d at 212. Accordingly, the Court finds that the alleged false

statements are material as a matter of law.

b. Sufficiency of the "Trick, Scheme or Device" Allegations

Defendants also challenge Counts Six through Nine of the Indictment which charges violations of 18 U.S.C. § 1001 on grounds that these counts do not sufficiently charge concealment by "trick, scheme or device." Under this statute, it is a crime to conceal by any trick, scheme, or device any matter within the jurisdiction of any department or agency of the United States. "The elements of an offense under the concealment portion of the statute are: (1) knowingly and willfully; (2) concealing and covering up by trick, scheme, or device; (3) a material fact; (4) in any matter within the jurisdiction of a department or agency of the United States. United States v. Swaim, 757 F.2d 1530, 1533 (5th Cir.) (citations omitted), cert. denied, 474 U.S. 825, 106 S.Ct. 81 (1985). In the Indictment, the government alleges that ADM, Ashton and Dale "concealed . . . by trick, scheme and device, material facts which [defendants] were under an obligation to disclose . . . said trick, scheme and device being the intentional failure to disclose said facts . . . ."

The precise issue before the Court is whether the indictment charging defendants with concealing or covering up by trick, scheme, or device a material fact is insufficient because it defines the trick, scheme or devise used as the intentional failure to disclose information which defendants were under an obligation to disclose. Defendants contend that the indictment is insufficient because it does not allege an affirmative act by which the facts are concealed as required by United States v. London. In defendants' view, these counts allege "a mere failure to disclose" information and, as such, cannot constitute a "trick, scheme or device." In London, the court stated, "The mere omission of failing truthfully to disclose a material fact, which is simply the negative aspect of the affirmative act of falsely stating the same material fact, does not make out an offense under the conceal or cover up clause of section 1001." Id. at 214 (footnote omitted).

Defendants' argument must be rejected. The government correctly

asserts that a person's deliberate failure to disclose to the government material facts, in the face of a duty to disclose such facts, constitutes an "affirmative act" within the contemplation of the statute. For this reason, the government contends, defendants' nondisclosure is distinguishable from a "passive failure to disclose" or "mere silence in the face of an unasked question." The Court agrees. "Generally, a defendant cannot be prosecuted under § 1001 for concealing material facts unless he had a duty to disclose the material facts at the time he was alleged to have concealed them." United States v. Nersesian, 824 F.2d 1294, 1312 (2d Cir. 1987) (citation omitted). See also United States v. Perlmutter, 656 F. Supp. 782, 789 (S.D.N.Y.) ("While the concealment of a fact that no one has a legal duty to disclose may not be a violation of this section, . . . such is not the case where a regulation or form requires disclosure."), aff'd, 853 F.2d 1430 (2d Cir. 1987), cert. denied, 485 U.S. 935, 108 S.Ct. 1110, 99 L. Ed. 2d 271 (1988). [**37] The case law is clear that the deliberate failure to disclose material facts in the face of a specific duty to disclose such information constitutes a violation of the concealment provision of § 1001. Since the Indictment in fact alleges that defendants failed to disclose material facts to the Department of Defense which they had an obligation to disclose, the Court concludes that the indictment sufficiently charges concealment by "trick, scheme or device" in violation of § 1001.

c. Falsity

Defendants Dale, Ashton and ADM have moved for dismissal of Count Ten of the Indictment on grounds that the statement alleged in Count Ten is not false as a matter of law. Count Ten charges these defendants with falsely answering "no" to the question "Does your organization have interlocking directors with foreign interests?" in a document submitted to the Department of Defense in connection with their application for a security clearance. Relying on United States v. Race, 632 F.2d 1114 (4th Cir. 1980), defendants argue that the statement alleged as false was authorized by a reasonable interpretation of the question posed.

In Race, the court held that a prosecution for making false statements cannot be founded on an ambiguous contract. Race involved a contract between Consolidated Services, Inc. ("CSI") and the Navy to secure the delivery of labor and services. CSI was charged with submitting false and fraudulent invoices under the contract in violation of 18 U.S.C. §§ 2, 371, 1001. The court initially noted that the government is required to prove the falsity of the statement in any prosecution under § 1001. Id. at 1119. Although the court found that the contract clearly authorized CSI's submissions, it further held that even if the contract was ambiguous, that is "susceptible of at least two reasonable constructions," the defendants could not as a matter of law, be found guilty of making a false statement. Id. at 1120. "This is because one cannot be found guilty of a false statement under a contract beyond a reasonable doubt when his statement is within a reasonable construction of the contract." Id. Additionally, the court stated that CSI's good faith was irrelevant in determining falsity. Since "the Government must prove both the falsity of the statement and . . . that the utterer knew the statement was false. . . . [,] it thus makes no difference what the defendants thought if CSI's billings were authorized under a reasonable interpretation of the contract . . ." Id.

Defendants argue that the question "Does your organization have interlocking directors with foreign interests?" could be reasonably interpreted as excluding foreign corporations wholly owned by American citizens. Defendants premise this interpretation on the fact that the purpose of the security clearance is to prevent the leaking of classified information to foreign powers. Moreover, defendants insist that in this context a question regarding "foreign interests" suggests foreign citizens and foreign powers rather than Hong Kong corporations owned entirely by American citizens. Thus, defendants argue that the phrase in the question is so ambiguous on its face, that as a matter of law, their answer to it could not have been false.

In opposition, the government argues that defendants' claim is a factual defense to the charge which must be decided by the jury, not by the court at the motions level. In the government's view, the defendants claim that they did not knowingly make a false statement

since they did not understand or were confused by the question. This characterization misconstrues defendants' argument. By this motion, the Court will not be required to rule on the defendants' subjective intent. Rather, the issue is whether the phrase is so ambiguous that, as a matter of law, defendants' answer to the question could not have been false.

While the Court feels that the Race decision may be applicable to Count Ten of the Indictment, the Court feels that it would not be possible to make a determination on this issue at this stage of the proceedings. The Court will follow the approach taken by other Courts which have held that a Race motion should be made at the close of the government's evidence. See, e.g., United States v. General Dynamics Corp., 644 F. Supp. 1497 (C.D.Cal. 1986), rev'd on other grounds, 828 F.2d 1356 (9th Cir. 1987); United States v. Computer Sciences Corp., 511 F. Supp. 1125, 1136 (E.D.Va. 1981), rev'd on other grounds, 689 F.2d 1181 (4th Cir. 1982), cert. denied, 459 U.S. 1105, 103 S.Ct. 729, 74 L. Ed. 2d 953 (1983). At that time defendants may bring the motion under Fed.R.Crim.P. 29. Id. Accordingly, defendants' motion to dismiss Count Ten on grounds that the statement alleged in Count Ten is not false as a matter of law is denied without prejudice.

d. Exculpatory No Doctrine

Defendants argue that the false statement and concealed facts alleged in the Indictment fall within the "exculpatory no" exception to § 1001.[12] One of the five requirements that defendants must establish to satisfy the doctrine is that the false statement must not impair the basic functions entrusted by law to the federal agency.[13]

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[12] The "exculpatory no" has not been explicitly adopted or rejected by this Circuit. See United States v. North, 708 F. Supp. 364, 369 (D.D.C. 1988).

[13] The other four requirements of the doctrine are: (1) the false statement must be unrelated to a claim to a privilege or a claim against the government; (2) the declarant must be responding to inquiries initiated by a federal agency or department; (3) the government's inquiries must not constitute a routine exercise of administrative responsibility; and (4) a truthful answer would have incriminated

Defendants argue that the statements and omissions alleged in the Indictment could not have perverted the normal functioning of the government because they were immaterial to the issue under consideration by the agency; i.e., whether to grant the defendants a security clearance. In Section V(a) of this Memorandum Order, the Court determined that the false statements which are alleged in Counts Six through ten were material to the Department of Defense's inquiry. In light of this decision, defendants have failed to establish that the false statements did not impair the basic functions entrusted to the agency, one of the criteria required under the "exculpatory no" doctrine. Accordingly, defendants' motion to dismiss must be denied on grounds that the "exculpatory no" doctrine is not applicable here.

An appropriate Order was entered prior to trial.

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the declarant. United States v. Alzate-Restreppo, 890 F.2d 1061, 1066 (9th Cir. 1989) (citations omitted).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Filed May 3, 1990

UNITED STATES OF AMERICA

V **Civil Action No. 90-27**

DAVID M. DALE, et al

MEMORANDUM ORDER

This case comes before the Court on the Motion for Discovery filed by defendant Automated Data Management, Inc. ("ADM"). The Court briefly heard oral argument on May 3, 1990. ADM moves pursuant to Fed. R. Crim. P. 16 for discovery of statements made by former officers, agents and employees of ADM, including David M. Bowers ("Bowers"), W. Charles Roth ("Roth"), Thomas D. Fitzgerald, III ("Fitzgerald"), Margo I. George ("George"), and Tony Lam ("Lam"). Rule 16(a)(1)(A) provides:

> Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of his testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which the witness was involved.

As an initial matter, the Court must reject the government's contention that ADM is somehow not entitled to the benefits accorded corporate defendants under Rule 16 because ADM is the "alter-ergo" of co-defendants Michelle Ashton ("Ashton") and David Dale ("Dale"), whom are ADM's principle officers and shareholders. The government has chosen to charge ADM as an entity. Notably, the government has also, in another motion, requested that the Court modify the bond status of ADM to require ADM to post a two million dollar bond to insure that it will be able to meet any fine imposed by this Court. See Government's Request for Modification of Conditions of Release. In view of the fact that the government has, for some purposes, chosen to treat ADM as an entity separate and apart from defendants Ashton and Dale, it appears anomalous for the government to now urge that the Court disregard ADM's corporate nature. It is the Court's view that ADM is entitled to those benefits provided corporate defendants in Rule 16(a)(1)(A).

Rule 16 specifically states that the corporate defendant may discover the grand jury testimony of former employees.[14] To constitute testimony covered by Rule 16(a)(1)(A), the former employee must have been, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to the alleged conduct in which he was involved. Bowers is the only former ADM employee who satisfies the standard required under Rule 16.[15] The other employees do

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[14] In addition to grand jury testimony, ADM requests all statements made by its former employees. Rule 16, however, does not provide for discovery of these materials. ADM has not, in fact, offered any authority which interprets Rule 16 to apply to statements of former employees of corporate defendants. Accordingly, this Court will limit this motion to the grand jury testimony of ADM's former employees and decline to extend Rule 16 to encompass production of all statements of these persons.

[15] The government concedes that Bowers falls within Rule 16. The Court also notes that Bowers testified at the suppression hearing held on April 30 - May 2, 1990 that he had been involved in ADM's alleged illegal activities.

not fall within the ambit of the rule.

With respect to Fitzgerald, George and Lam, ADM asserts that they were each in a position to bind the corporation. This fact is not dispositive of the issue, however, because Rule 16 requires more than a showing that the former employee was so situated as an officer or employee so as to have been in a position to bind the corporation. Rule 16 also requires that the former employee "was, at the time of the offense, personally involved in the allege conduct constituting the offense." The "offense" at issue in Rule 16 is the offense as charged by the prosecutor. In the instant case, defendants have been charged with participating in a tax evasion scheme. Since neither ADM nor the government has alleged that Fitzgerald, George or Lam were involved in the alleged tax evasion scheme, these persons are not covered by Rule 16 and their grand jury transcripts are not discoverable by ADM.

With respect to Roth, the Court likewise finds that he does not satisfy the Rule 16 standard such that discovery of his grand jury testimony is warranted. ADM asserts that Roth meets the standard because ADM alleges that Bowers and Roth were engaged in a long term conspiracy to defraud ADM and because ADM alleges that they were actively involved in corporate matters which form the crux of the indictment. Unlike Bowers, its not clear that Roth was personally involved in the alleged conduct constituting the offense as charged in the indictment. Having observed Roth and listened to his testimony at the suppression hearing and having listened to the tapes recorded by Roth which are the subject of the motion to suppress, the Court is not of the opinion that Roth was personally involved in the alleged tax evasion scheme. ADM has offered nothing other than bare allegations to persuade the Court otherwise. Moreover, whether or not Roth was involved in a conspiracy to defraud ADM, as alleged by ADM, is immaterial to this motion. Rule 16 requires that the former employee have been "personally involved in the alleged conduct constituting the offense"; i.e., the tax evasion scheme. ADM cannot catapult Roth into the ambit of Rule 16 merely by alleging that he is guilty of some wrongful conduct other than the conduct which constitutes the

charged offense in this case. Accordingly, the grand jury testimony of Roth is not discoverable by ADM under Rule 16.

Having found that only the grand jury testimony of Bowers is discoverable by ADM, the Court must next determine whether to exercise its discretion to grant such discovery. The Court has heard the positions advanced by both the government and ADM on this question. The Court recognizes that Bowers also has an interest in whether his grand jury testimony is disclosed to ADM and his position on this question remains to be heard. Thus, in line with the rationale expressed by the court in U.S. v. White Ready-Mix Concrete Co., 449 F.Supp. 808 (N.D. Ohio 1978), the Court feels that Bowers ought to be given an opportunity to object to production of his testimony. See also C. Wright, 2 Federal Practice and Procedure § 253 (1982) ("It has also been held that the better practice in exercising [Rule 16(a)(1)(A)] discretion is to notify nonparty witnesses that their testimony is being sought and to give then an opportunity to be heard on whether to allow the discovery or to do so only under a protective order."). In line with the foregoing, ADM"s motion for discovery is denied with respect to the grand jury testimony of Roth, Fitzgerald, George, and Lam. The motion for discovery of Bowers' grand jury testimony is held in abeyance.

Accordingly, it is hereby

ORDERED that ADM's Motion for Discovery of the grand jury testimony of W. Charles Roth, Thomas D. Fitzgerald, III, Margo I. George, and Tony Lam is denied; and it is further

ORDERED that ADM's motion for discovery of the grand jury testimony of David M. Bowers is held in abeyance; and it is further

ORDERED that ADM shall serve David M. Bowers, whose testimony it seeks, with a copy of the motion, opposition, and reply, and with a copy of this Memorandum Order on or before May 7,

1990; and it is further

ORDERED that this motion will be scheduled for further hearing on May 14, 1990 at 10:30 a.m. with David M. Bowers or his counsel being given an opportunity to be heard; and it is further

ORDERD that David M. Bowers may respond to the motion either in person or by counsel on May 14, 1990, or in writing on or before may 11, 1990.

Date: July 11, 1991 JOHN GARRETT PENN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Filed May 17, 1990

UNITED STATES OF AMERICA

V **Criminal No. 90-27**

DAVID M. DALE, et al

MEMORANDUM ORDER

This case again comes before the Court on the Motion for Discovery filed by defendant Automated Data Management, Inc. ("ADM"). In a Memorandum Order filed May 3, 1990, the Court previously addressed this motion. The Court therein denied ADM's motion for discovery with respect to the grand jury testimony of W. Charles Roth, Thomas D. Fitzgerald, III, Margo I. George and Tony Lam. The Court held in abeyance ADM's motion for discovery of the grand jury testimony of David M. Bowers ("Bowers"), in order to allow Bowers an opportunity to respond to ADM's motion. Bowers has not responded to the motion filed by ADM in the time allotted under the May 30, 1990 Memorandum Order. Thus, the Court will assume that Bowers takes no position regarding production of his grand jury testimony.

The Court has already determined that Bowers satisfies the standard required under Rule 16 (a)(1)(A) of the Federal Rules of Criminal Procedure such that his grand jury testimony is discoverable. The only remaining issue is whether the court should exercise its discretion to allow ADM pre-trial discovery of this material. In opposing ADM's motion, the government has instead offered production of Bowers' testimony as Jencks material one week prior to trial.

The Court concludes that the motion should be granted for several reasons. First, ADM will obtain Bowers' testimony from

the government as Jencks material in any event. The government proposes to make the material available one week prior to trial. Since the trial is currently a little over two weeks away, earlier production of this material will not prejudice the government. In addition, the Court notes that Bowers has not filed an objection to production of his grand jury testimony. Finally, the Court does not find any of the government's arguments in opposition to the motion to be persuasive.

In urging the Court to deny ADM's motion, the government first argues that because ADM's only shareholders are also defendants in this case and their interests are identical, it does not make sense for ADM to have greater access to the discovery at issue. In addition, the government contends that since Bowers' testimony is also Jencks material, there is no reason for ADM to have earlier access to the testimony than the other defendants. This argument is belied by the fact that disclosure of Bowers' grand jury testimony to ADM will, in practical terms, achieve the same result as release to its co-defendants as well. It is plainly obvious to the Court and the government that defendants are pursuing a joint defense and have filed joint motions. Any inference that Bowers' grand jury testimony would not receive the same joint consideration by the defendants is unsupported.

The government also argues that it has interests which can be threatened or compromised by premature release. For example, the government fears that defendants will construct a defense around Bowers' anticipated testimony. Moreover, the government is concerned that defendants will conduct investigation based on leads in Bowers' testimony or may identify potential government witnesses. All of the interests asserted by the government are essentially directed at the hazards of pre-trial discovery generally, rather than whether disclosure of Bowers' testimony should be granted in this case. In deciding whether to exercise its discretion under Rule 16, the Court does not find these general considerations to be useful.

In view of the above, the Court will grant ADM's motion

for discovery. Accordingly, it is hereby

ORDERED that ADM's motion for discovery of the grand jury testimony of David M. Bowers is granted; and it is further

ORDERED that the government shall provide defendant ADM with a copy of the grand jury testimony of David M. Bowers on or before May 18, 1990.

Date: MAY 16, 1990 JOHN GARRETT PENN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Filed May 18, 1990

UNITED STATES OF AMERICA

V **Criminal No. 90-27**

DAVID M. DALE, et al

MEMORANDUM ORDER

This case comes before the Court on a Motion to Disclose Grand Jury Instructions filed by defendants. After careful consideration of the motion, the opposition thereto and the entire record in this case, the Court concludes that the motion should be denied.

Defendants request disclosure of the instructions on the applicable law that were given to the grand jury which returned the Indictment in this case. Rule 6(e) codifies the traditional rule of grand jury secrecy and establishes disclosure procedures. The primary reasons for grand jury secrecy are to encourage potential witnesses to testify fully, to prevent the flight of potential indictees, and to avoid adverse publicity for those investigated but not indicated. Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 219, 99 S.Ct. 1667, 1673, 60 L.Ed.2d 156 (1979). There are exceptions to the general rule of secrecy, however.

In this case, defendants seek to obtain pre-trial discovery of grand jury transcripts pursuant to United States v. Sells Engineering Inc., 463 U.S. 418, 445 (1983), and Rule 6(e)(3)(C)(ii) of the Federal Rules of Criminal Procedure.

Under both of these standards, the burden is on the defendants to show that disclosure is appropriate. Sells Engineering

requires the defendant to make a showing that "a particularized need" for the grand jury transcript outweighs the policy of secrecy. Rule (e)(3)(C)(ii), on the other hand, provides for disclosure of grand jury transcripts "upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury."

The issue presented is whether defendants have made a sufficient showing to warrant disclosure of grand jury material. Defendants limit their request to the instructions given to the grand jury with regard to the definitions of "foreign connections," "foreign interests," and "foreign businesses" which form the basis for Counts 6 through 10 of the Indictment. According to defendants, since the definitions of these terms are "inherently ambiguous", the grand jury may have been improperly instructed as to the elements of the offenses charged. Consequently, defendants seek disclosure of the grand jury instructions on grounds that the instructions may provide grounds for a motion to dismiss the Indictment because of matters occurring before the grand jury.

In opposing the motion, the government argues that the defendants have not made a sufficient showing to satisfy the requirements for production of grand jury materials under the applicable test for disclosure. The Court agrees.

The basis for defendants' motion is pure speculation. In effect, defendants merely have a groundless desire to see what occurred before the grand jury. Their claim is supported only by their unsubstantiated allegation that instructions given to the grand jury may have been improper. This is not enough to satisfy the showing required for disclosure of grand jury proceedings under either of the standards relied upon for disclosure. See, e.g., United States v. Pike Industries, 575 F.Supp. 885, 891 (D.Vt. 1983) (Defendants' argument that the prosecutor possibly gave erroneous instruction to the grand jury because the Indictment was nebulous did not satisfy the particularized need standard.); United States v. Hart, 513 F.Supp. 657 (E.D.Pa. 1981) (finding that mere speculation of inadequate grand jury instructions is not enough to

entitle the defendant to disclosure of grand jury material). "Nor has it been show that an in camera inspection of the grand jury [instructions] would serve the interests of justice." United States v. Pike Industries, 575 F.Supp. at 891. Accordingly, defendant's motion must be denied.

In view of the above, it is hereby

ORDERED that defendants' motion to disclose grand jury instructions is denied.

Date: MAY 17, 1990 JOHN GARRETT PENN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Filed May 25, 1990

UNITED STATES OF AMERICA

V **Criminal No. 90-27**

DAVID M. DALE, et al

ORDER

This case now comes before the Court on defendants' Motion to Suppress Tangible Evidence and its Fruits Seized in Search of ADM Offices. The Court heard oral argument on April 25, 1990. After consideration of the motion, the opposition thereto and the entire record in this case, the Court concludes, for the reasons set forth in a Memorandum to be filed, that the motion should be denied.

In view of the above, it is hereby

ORDERED that the defendants' motion to suppress tangible evidence and its fruits seized in search of ADM offices is denied.

Date: MAY 18, 1990 JOHN GARRETT PENN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Filed May 18, 1990

UNITED STATES OF AMERICA

V **Criminal No. 90-27**

DAVID M. DALE, et al

MEMORANDUM ORDER

This case comes before the Court on defendant's Motion for Discovery and Production of Brady and Jencks Act Materials. Defendants move for discovery pursuant to Fed. R. Crim. 16, Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963) and the Jencks Act, 18 U.S.C. § 3500 (1982). Specifically, defendants seek an order compelling the government to produce: (1) the 1988 income tax returns filed by David M. Bowers ("Bowers"); (2) early production of Jencks Act materials; and (3) any notices filed with the court pursuant to Fed. R. Crim. P. 6(e)(3)(B) and any orders entered pursuant to Fed. R. Crim. P. 6 in connection with the grand jury proceedings in this case.

The first item requested by the defendants is Bowers' 1988 income tax return. Bowers, a government witness, was employed by defendant Automated Data Management, Inc. ("ADM") in Korea from October 1985 through August 1987. Defendants argue that they are entitled to Bowers' 1988 tax return under both Rule 16 and Brady because they are charged with certain tax offenses and Bowers is allegedly an unindicted co-conspirator. Defendants feel that this material thus bears on Bowers' credibility.[16]

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[16] Defendants also state that ADM sent Bowers an amended 1099 form in 1989 which states that he received income in 1986 and 1987 that was not originally reported by ADM. In defendants' view, the reporting of this additional sum by Bowers implicates his credibility. The Court must reject this argument since the

The government argues in opposition that it should not be required to turn over a witness' tax return where, as here, the return pertains to a time period not relevant to the prosecution. It is undisputed that Bowers resigned from ADM in the summer of 1987, prior to the filing of the corporate income tax return which is the subject of Counts two through four of the Indictment. Under these circumstances, the Court does not feel that defendants are entitled to Bowers' 1988 income tax return for purposes of impeachment any more than they are entitled to the income tax return of any other government witness. Consequently, defendants' request for production of Bowers' 1988 income tax return is denied.

Defendants also move for early production of Jencks Act materials. Defendants specifically request such material in advance of trial.

> Federal Rule of Criminal Procedure 16(a)(2) prohibits discovery of statements by government witnesses or prospective government witnesses except as provided in the Jencks Act, 18 U.S.C. § 3500 (1982). The Jencks Act directs that in a criminal prosecution, statements made by government witnesses or prospective government witnesses are not open to discovery or inspection by the defense until said witnesses have testified on direct examination in the trial of the case.

United States v. Tarantino, 846 F.2d 1384, 1414 (D.C. Cir. 1988) (citations omitted). The court further noted in United States v. Tarantino "that trial judges, with the consent of the government, routinely fashion discovery procedures that entail production of Jencks material before trial or prior to direct examination, in order to facilitate the defense's preparation for cross-examination", id at

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amended 1099 has no relevance to the 1988 tax year, which is the subject of this motion.

1415 n.12, although the Jencks Act does not so require. It is for precisely this reason -- the need for preparation -- that defendants herein request early production of Jencks material. The government opposes pre-trial production of Jencks Act materials, except for perhaps the first government witness, and instead proposes making such material available in advance of the direct testimony of each government witness. The government does not, however, state exactly how far in advance of the witnesses' testimonies that it foresees making Jencks material available.

Since this is a complex case wherein the trial is expected to last four weeks, the Court believes that production of Jencks material seventy-two hours prior to the direct testimony of each government witness would allow defendants a sufficient amount of time to prepare for cross-examination. The Court does not feel that defendants have shown sufficient grounds for full-scale pre-trial production of this material. Accordingly, defendants request for early production of Jencks Act materials is granted on the terms described above.

Finally, defendants seek notices provided to the Court pursuant to Fed. R. Crim. P. 6(e)(3)(B), as well as any judicial orders issued under Rule 6. Defendants argue that the three distinct episodes of grand jury abuse, which they identified in their Motion to Dismiss for Grand Jury Abuse, satisfy the particularized need requirement for the disclosure of such material. The outcome of defendants' underlying motion to dismiss will, of course, be relevant to whether defendants have met the particularized need standard. Since this motion to dismiss is still pending, the Court will thus postpone ruling on this portion of the instant motion. Accordingly, defendants' motion for discovery of Rule 6(e) notices and orders is held in abeyance.

In view of the above, it is hereby

ORDERED that defendants' motion for discovery and production of Brady and Jencks Act materials is granted in part and denied in part; and it is further

ORDERED that defendants' motion for discovery of the 1988 income tax returns filed by David M. Bowers is denied; and it is further

ORDERED that defendants' motion for early production Jencks Act materials is granted insofar that the government must produce to the defendants Jencks Act material for each government witness seventy-two hours prior to the direct examination of that witness; and it is further

ORDERED that defendants' motion for discovery of Rule 6(e) notices and orders is held in abeyance.

Date: MAY 18, 1990 JOHN GARRETT PENN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Filed May 30, 1990

UNITED STATES OF AMERICA

V **Civil Action No. 90-27**

DAVID M. DALE, et al

ORDER

This case now comes before the Court on defendants' Motion to Suppress Illegal Tape Recordings. The Court conducted an evidentiary hearing on April 25, May 1-2, 1990. After careful consideration of the motion, the opposition thereto and the entire record in this case, the Court concludes, for the reasons set forth in a Memorandum to be filed, that the motion should be denied.

In view of the above, it is hereby

ORDERED that the defendants' motion to suppress illegal tape recordings is denied.

Date: MAY 30, 1990 JOHN GARRETT PENN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Filed May 31, 1990

UNITED STATES OF AMERICA

V **Criminal No. 90-27**

DAVID M. DALE, et al

ORDER

This case now comes before the Court on a number of motions filed by defendants; namely, (1) Defendants' Motion to Dismiss Count One; (2) Defendants' Motion to Dismiss Count Tow; (3) Defendants' Motion to Dismiss Count Five; and (4) Defendants' Motion to Dismiss Counts Six through Ten. After careful consideration of the motions, the oppositions thereto and the entire record in this case, the Court concludes, for the reasons set forth in a Memorandum to be filed, that the motions should be denied. In view of the above, it is hereby

ORDERED that the defendants' motion to dismiss count one is denied; and it is further

ORDERED that defendants' motion to dismiss count two is denied; and it is further

ORDERED that defendants' motion to dismiss count five is denied; and it is further

ORDERED that defendants' motion to dismiss counts six through ten is denied.

Date: MAY 31, 1990 JOHN GARRETT PENN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Filed May 31, 1990

UNITED STATES OF AMERICA

V **Criminal**
No. 90-27

DAVID M. DALE, et al

MEMORANDUM ORDER

This case comes before the Court on the defendants' Motion to Dismiss Indictment for Grand Jury Abuse. Defendants argue that Indictment in this case must be dismissed because of three distinct forms of grand jury abuse. Alternatively, defendants request disclosure of certain grand jury testimony. In addition, defendants' Motion for Discovery and Production of Brady and Jencks Act Materials is also pending before the Court. By Memorandum Order filed May 18, 1990, the Court granted in part and denied in part this motion. The Court also held in abeyance defendants' motion for discovery of Rule 6(e) notices and orders. After careful consideration of these motions, the oppositions thereto, and the entire record in this case, the Court concludes that the three alleged aspects of abuse do not warrant dismissal of the Indictment. The Court, however, finds that disclosure of the grand jury testimony of Thomas Lantz is required. Finally, defendants' motion for discovery of Rule 6(e) notices and orders will be denied.

With respect to the motion to dismiss the Indictment, defendant David M. Dale ("Dale") first contends that the grand jury was denied the opportunity to consider essential evidence exculpating him. The evidence at issue consists of the results of a polygraph examination performed on Dale which he contends negates guilt and might reasonably have led the jury not to indict him. Thus, Dale argues that the government's concealment of the results of the polygraph examination from the grand jury breached

his right to an independent and informed grand jury. In the Court's view, the results of Dale's polygraph examination is not the type of evidence which "might reasonable be expected to lead the jury not to indict." United States v. Ciabrone, 601 F.2d 616, 623 (2d Cir. 1979). Therefore, the government's failure to present this evidence to the grand jury does not require dismissal of the Indictment.

Second, Dale contends that the Indictment should be dismissed because during the grand jury appearance of Thomas Lantz ("Lantz"), Dale's accountant, the prosecutor elicited testimony which violated Dale's Sixth Amendment right to counsel. Specifically, Dale asserts that the prosecutor questioned Lantz regarding whether Dale had sought referral to a criminal tax attorney and further emphasized the reputation of said attorney for handling the defendant of criminal tax matters.[17] In Dale' view, these inquiries by the prosector infringed on his constitutional right to seek counsel of his own choice and require dismissal of the Indictment. Dale relies on United States v. Liddy, 509 F.2d 428, 444 (D.C. Cir. 1974), cert. denied, 420 U.S. 911 (1975), United States v. Moeckly, 769 F.2d 453, 465, (8th Cir. 1985) and United States v. Gold, 470 F.Supp. 1336, 1352 (N.D. Ill. 1979) for this proposition. Alternatively, Dale and his co-defendants request disclosure of the transcript of Lantz's testimony before the grand jury pursuant to Fed.R.Crim.P. 6 and United States v. Sells Engineering, Inc., 463 U.S. 418, 445 (1983). In this regard, defendants' argue that the events set forth in the Lantz affidavit demonstrate that they have a "particularized need" for the transcript and that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

In Gold, the defendants alleged a totality of grand jury

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[17] Defendants have submitted an affidavit of Thomas Lantz which states that the prosecutor questioned him before the grand jury regarding Dale's supposed need for a criminal attorney and emphasized the work criminal during the questioning.

abuse by the government attorney. The court held that the prosecutor acted improperly when he suggested by his questions and comments that defendants believed themselves guilty of crime because they employed a firm of attorneys that had a nationwide reputation as defense lawyers in criminal cases. Although the court dismissed the Indictment after considering the totality of prosecutor conduct, the court referred to this particular conduct as an "aggravating circumstance[] . . . which alone might, as a matter of law or in a particular case, be inadequate." Id, at 1352 (citation omitted). Similarly, in United States v. Liddy, the court held that there was error in the jury instruction which "apparently considered it generally proper to take into account the time and circumstances of retaining an attorney." Liddy, 509 F.2d at 444. Since the evidence against the appellant was so overwhelming, however, the Court found such error to be harmless. Finally, in United States v. Moeckly, the prosecutor questioned defendant before the grand jury regarding whether he had spoken to certain well-known defense attorneys in connection with his subpoena to testify. The court states that "[s]uch questioning is prejudicial, irrelevant, and improper." Moeckly, 769 F.2d at 465. Nevertheless, the court held that dismissal of the indictment was not warranted in light of the evidence before the grand jury and the limited prejudice to defendant's rights.

The government does not deny that the alleged inquiry took place. Instead, it argues that there is nothing improper about questioning a witness in this manner before the grand jury. The Court disagrees. Dale has a right, though not absolute, to seek representation of counsel in connection with criminal tax matters. "It is improper, where a right is constitutional, for a prosecutor either to question or comment on its exercise. . . . To do so is to make assertion of that right costly." Gold, 470 F.Supp. at 1342. For this reason, the Court finds that the prosecutor's conduct before the grand jury may have been prejudicial. Based on Lantz' representations, however, the Court does not feel that this conduct standing alone deprived Dale or his co-defendants of a fair and unbiased jury such that dismissal of the Indictment is required. On the other hand, the Court finds that defendants' allegations satisfy

the standards for disclosure of grand jury testimony. Accordingly, the Court will require the government to produce the grand jury transcript of Lantz.

Third, defendants argue that the government presented to the grand jury illegal tape recordings. Defendants argue that the tapes were recorded in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. section 2510 et seq. The tape recordings at issue are also the subject of defendants' motion to suppress illegal tape recordings. Since the Court has already determined in that motion that the recordings were not intercepted in violation of Title III, this argument must be rejected.

For the foregoing reasons, defendants' motion to dismiss indictment for grand jury abuse will be denied, but their alternative request for disclosure of the grand jury testimony of Lantz will be granted. In addition, the Court finds that the alleged grand jury abuse does not warrant disclosure of Rule 6(e) notices and orders.

In view of the above, it is hereby

ORDERED that defendants' motion to dismiss Indictment for grand jury abuse is denied; and it is further

ORDERED that the government must produce to the defendants the grand jury transcript of Thomas Lantz on or before June 4, 1990; and it is further

ORDERED defendants' motion for discovery of Rule 6(e) notices and orders is denied.

Date: MAY 31, 1990

JOHN GARRETT PENN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Filed April 24, 1991

UNITED STATES OF AMERICA

V Criminal No. 90-0027 JGP

DAVID M. DALE
MICHELLE ASHTON
TERRENCE SWEENEY
MARTIN SEGAL
AUTOMATED DATA MANAGEMENT, INC.

ORDER

After giving careful consideration to the defendants' objection to the applicability of the Sentencing Guidelines to Count 1 of the indictment the Court concludes that the Guidelines apply to that Count for the reasons discussed in a Memorandum to be filed.

It is hereby

ORDERED that the Sentencing Guidelines are applicable to the conspiracy charges set forth in Count 1.

Apr 24, 1991

JOHN GARRETT PENN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Filed July 11, 1991

UNITED STATES OF AMERICA

v. **Criminal No. 90-27**

DAVID M. DALE, et al

MEMORANDUM ORDER

This case comes before the Court on defendants' Joint Motion for Judgment of Acquittal after Verdict or, in the Alternative, Motion for a New Trial. Defendants' motion is divided into three sections. The Court will address each section in turn.

In section one, defendants David M. Dale ("Dale"), Michelle Ashton ("Ashton") and Automated Data Management ("ADM") move for judgment of acquittal on Counts Six through Ten pursuant to Fed. R. Crim P. 29(c). Alternatively, defendants move for a new trial on these counts pursuant to Rule 33. Defendants Dale, Ashton and ADM were convicted under Counts Six through Ten of violating 18 U.S.C. section 1001--the "false statement" statute--by failing to disclose material facts and making false statements on forms they submitted to the Department of Defense. In connection with an application for a security clearance, Dale and Ashton were each required to complete a document entitled "Personnel Security Questionnaire". This form required full disclosure of all foreign property and foreign business connections. Although Dale and Ashton disclosed their connections with and ownership of certain German and Guam companies on the form, the did not disclose their interests or connections with two Hong Kong companies, Swaffham and Gemona.

Since Dale and Ashton did disclose the other foreign companies on the Personnel Security Questionnaire, they were each required to execute follow-up forms. These subsequent forms, entitled "Statement of Full Disclosure of All Foreign Connections," certified that the signor had fully disclosed his/her foreign connections, and further that s/he would make sure these foreign companies complied with the applicable security regulations. Again, Dale and Ashton failed to disclose their ownership of or relationship with Swaffham and Gemona on these forms. Finally, defendants Dale and Ashton answered "no" to the question "Does your organization have interlocking directors with foreign interests?" in a document entitled "Certificate Pertaining to Foreign Interests."

In section one of their motion, defendants first argue that the statements and omissions which form the basis of Counts Six through Ten were not material, and, therefore, were not a crime under 18 U.S.C. section 1001. Defendants unsuccessfully raised this argument in a pretrial motion. To the extent that defendants have set forth the same legal argument here as in the pretrial motion, the Court will deny the motion.

Defendants further argue that the statements are not material because the evidence at trial was inadequate to demonstrate the materiality of the facts at issue beyond a reasonable doubt. Specifically, defendants contend that the testimony of government witness Karen Jackson, the security specialist for the Defense Investigative Service, proved that the only agency action which would have occurred as a result of the disclosures occurred anyway. Relying on Agent Jackson's testimony, defendants argue that disclosure of their connections with Swaffham and Gemona would have only resulted in their being required by the agency to fill out an additional form, i.e., the "Statement of Full Disclosure of All Foreign Connections." Dale and Ashton were required to fill out this additional form anyway because they disclosed their connections to the other foreign companies. Thus, defendants contend, the only agency action which would have occurred as a consequence of disclosure of the Hong Kong companies on the questionnaire occurred anyway. In short, defendants argue that they are entitled

to judgment of acquittal because their failure to disclose all the foreign companies on the questionnaire did not actually affect the agency's decision to grant a security clearance, since they had to fill out the "Statement of Full Disclosure' in any event.

Defendants' argument is premised on a misunderstanding of the materiality requirement and must be rejected. "The test of materiality is whether the statement 'has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a [particular] determination.'" United States v. Hansen, 772 F.2d 940, 949 (D.C. Cir. 1985) (quoting United States v. Diggs, 613 F.2d 988, 999 (D.C. Cir. 1979), cert. denied, 446 U.S. 982 100 S.Ct. 1262 (1986). Materiality, however, does not require an assessment of how the statement at issue actually affected the agency. Therefore, materiality does not require proof in this case that disclosure of Dale and Ashton's connections to the Hong Kong corporations would have influenced the agency's ultimate determination to grant or withhold a security clearance. See also, United States v. Richmond, 700 F.2d 1183, 1189 (9th Cir. 1983) (rejecting materiality challenge which claimed that federal functions were not actually affected: "[T]he test of materiality is whether a false statement has the abstract capability of influencing an agency's governmental functions, not whether it actually has influenced those functions." (emphasis is original).

Defendants also argue that the evidence presented at trial was insufficient to prove that the statements were even false, or assuming that they were false, that the defendants acted with the requisite intent to establish a violation of Section 1001. Essentially, defendants allege that the statements on the forms were "literally true" at the time they were made because these statements were before certain of the stock transfer forms--which transferred ownership of Swaftham and Gemona to Dale and Ashton--were filed with the Hong Kong government.

This argument can be easily rejected as meritless. The forms at issue required that defendants disclose their foreign

"business connections" in addition to their ownership of foreign companies. For this reason, the jury was certainly entitled to apply a common sense understanding to the term "foreign connections," rather than a technical definition of the term which encompasses only those entities with whom the formalities of transfer of ownership had been affected under foreign law. Moreover, the evidence presented at trial was sufficient to demonstrate that defendants acted with the requisite criminal intent.

In section two of the motion, all defendants move pursuant to Rule 29 for judgment of acquittal on Count One. Defendants argue that if their convictions on Counts Six through Ten are overturned, the conspiracy count must also fail because the conspiracy charged therein alleged multiple objects. Defendants maintain that the whole count must fail because the general verdict returned by the jury does not indicate which object they found that the defendants had conspired to accomplish. Thus, defendants argue, once any of the objects is shown to be legally or factually insufficient to sustain conviction, the whole count must fail. Since the Court has not concluded that Counts Six through Ten should be set aside, defendants' argument here must also be rejected.

Finally, in section three, defendant Dale moves for judgment of acquittal on Count Five. Count Five charged Dale with wire fraud and aiding and abetting in violation of Sections 1343 and 2 of Title 18 of the United States Code. The wire transfer which formed the basis for this count was the transfer of $316,000 from the National Bank of Washington to an account in Switzerland. Dale argues that he is entitled to a judgment of acquittal on Count Five because the evidence at trial was insufficient to prove beyond a reasonable doubt that he was in any way connected to this wire transfer. Alternatively, Dale seeks a new trial on Count Five. Since the Court does not agree that Dale's conviction on Count Five should be set aside on sufficiency grounds, this section of the motion will also be denied.

In sum, the Court concludes that defendants are not entitled

to judgment of acquittal, or, in the alternative, a new trial, on the grounds set forth in the motion.

In view of the foregoing, it is hereby

ORDERED that defendants' joint motion for judgment of acquittal after verdict or, in the alternative, motion for a new trial is denied.

Dated: July 11, 1991 JOHN GARRETT PENN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Filed July 11, 191

UNITED STATES OF AMERICA

V **Civil Action No. 90-27**

DAVID M. DALE, et al

MEMORANDUM ORDER

This case comes before the Court on defendant Terence Sweeney's Motion for Arrest of Judgment pursuant to Rule 34 of the Federal Rules of Criminal Procedure.

Sweeney argues that his former defense counsel who represented him prior to indictment labored under an actual conflict of interest that adversely affected his representation. The alleged conflict of interest arises out of his former counsel's multiple representation of Sweeney along with co-defendant Martin Segal and Automated Data Management ("ADM"). Sweeney argues that because defense counsel had an ethical obligation to his other clients, he was precluded from advising Sweeney to cooperate with the government because such cooperation necessarily would conflict with the interests of ADM. He further claims that had the representation been unimpaired, his defense counsel undoubtedly would have advised him to seek immunity. In short, sweeney contends that he was prejudiced in that he did not obtain a disposition of his charges prior to trial.

Sweeney has not previously raised the instant claim. Notable, however, the Court has earlier been presented with similar questions concerning Sweeney's counsel's multiple representation of defendants. The government filed a pretrial motion to disqualify Sweeney's current counsel on the ground that his current counsel had previously represented and obtained confidential

communications from co-defendant Michelle Ashton and possibly other defendants in this case. The Court denied the motion and concluded that the government had not demonstrated that a conflict of interest either existed or was likely to arise. Further, the Court held that any potential conflict of interest was cured by the waivers of conflict-free representation taken by defendants Sweeney and Ashton. See Memorandum Order filed February 22, 1990.

The Court need not reach the merits of the instant motion. By failing to raise the issue of a defect in the grand jury process due to ineffective assistance of counsel in a pretrial motion, Sweeney has waived the right to challenge the indictment on this ground. See United States v. Harley, 682 F.2d 1018, 1021 (D.C. Cir. 1982). Under Fed. R. Crim. P. 12(b)(2), objections which are based on defects in the indictment must be brought prior to trial. Since Sweeney's challenge comes too late, it has been waived. See, e.g., United States v. Vecchiarello, 536 F.2d 420, 423 (constitutional claim to composition of grand jury waived since not raised prior to trial) (citing David v. United States, 411 U.S. 2133, 93 S.Ct. 1577 (1973)). Further, Sweeney has shown no cause why he should be relieved of that waiver. In fact, it is difficult for the Court to conceive of a justifiable reason why the instant motion was not brought pretrial, especially since the identical issue concerning multiple representation by Sweeney's present counsel had been raised at that time. Accordingly, the motion for arrest of judgment filed by defendant Sweeney will be denied.

In view of the foregoing, it is hereby

ORDERED that the motion for arrest of judgment filed by defendant Terence Sweeney is denied.

Date: July 11, 1991 JOHN GARRETT PENN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Filed July 11, 191

UNITED STATES OF AMERICA

V Criminal No. 90-27

DAVID M. DALE, et al

MEMORANDUM ORDER

This case comes before this Court on defendants' Joint Motion for Judgment of Acquittal or a New Trial.

Relying on Rule 29(a) of the Federal Rules of Criminal Procedure, defendants argue that the Court erred in deferring ruling on their motions for judgments of acquittal made at the close of the government's case.[18] Rule 29(a) provides in pertinent part:

> The Court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction or such offense or offenses.

Fed. R. Crim P. 29(a). According to defendants, Rule 29(a) does not authorize the trial court to defer ruling on a motion for judgment of acquittal made at the close of the government's case.

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[18] Defendants claim that they first moved for a judgment of acquittal at the close of the government's case-in-chief, but they do not cite any portion of the record in support of this assertion.

Moreover, defendants argue that they were prejudiced by the absence of a ruling on their motion because they were presented with an impossible choice. They claim that had they rebutted the factual claims the government made against them at trial, they would have risked introducing evidence in their own defense which would cure legally insufficient elements of the offenses. They further argue that had the Court ruled that the evidence was legally sufficient, their incentive to put on a defense case would have been substantially heightened.

The government opposes the motion on grounds that the defense motions for judgment of acquittal came after the close of the entire case, rather than after the close of the government's case. The government points out that the defendants announced their intention to rest immediately after the government rested and that the record does not indicate that any defendant requested a motion for judgment of acquittal between the conclusion of the government's case and the defense resting. Finally, the government contends that under Rule 29(b) it was proper for the Court to defer rulings on the motions since they came after the defense formally rested.

After reviewing the trial transcript in this case, the Court concludes that the government is correct in its assertion that defendants did not move for judgment of acquittal at the close of the government's case. On July 11, 1990, after presenting approximately six weeks of testimony and evidence, the government rested. Tr. 3496.[19] The government did so provisionally because there were outstanding evidentiary issues subject to resolution by the Court. Immediately after the government rested, the Court called counsel to the bench. The Court inquired of defense counsel how they wished to proceed at that point in view of the government resting. Specifically, the Court asked, "All right, let me ask counsel, the government has rested, and with respect to a defense case at this point, where do we stand? I mean, am I -- I'm not sure

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[19] "Tr." refers to the Volume XXVII of the trial transcript in this case.

[whether] the defendants are going to make motions. I'm not sure whether the defendants are ready to go forward this afternoon before the jury, or what?" Tr. 3497. In response to these questions, the defendants requested a brief recess to consider how to proceed. The Court granted this request and excused the jury.

Immediately after the recess, defendants announced to the Court their intention of also resting before the jury that afternoon--also provisionally because of the outstanding evidentiary issues. Counsel for defendant Automated Data Management ("ADM") stated, "I don't know, I believe I speak on behalf of all the defendants, your honor, it's the intention of the defendants to rest at this point." Tr. 3497-98. Defendants did not make or request a ruling on any motions for judgment of acquittal, despite the Court's earlier inquiry concerning this matter.

Thereafter followed a lengthy discussion of the outstanding evidentiary issues and a stipulation the parties sought to enter into evidence. Throughout this discussion, defendants repeatedly expressed their desire to rest in front of the jury that afternoon rather than waiting until the evidentiary issues were resolved. See, e.g., Tr. 3516, 3520, 3539, 3549. After the Court was satisfied that the remaining evidentiary issues would not cause the case to be reopened, defendants were permitted to proceed. The jury was brought in and the defense rested. Tr. 3551.

In view of the record set forth above, the Court concludes that defendants' motion should be denied. At the close of the government's case, defendants emphatically expressed their desire to rest before the jury. This was done without regard to any motions for judgment of acquittal. Moreover, the trial transcript reflects that although the Court raised the question of possible defense motions after the government rested, defendants did not seek a ruling on motions for judgment of acquittal at that time. In fact, counsel for defendant David M. Dale stated at one point that "time tomorrow will be spent, among other things, arguing any motions which are appropriate at this juncture of the case, as presented by the defense as well." Tr. 3523. Thus, even if a

motion for judgment of acquittal had been made prior to the defense formally resting, it is clear that defendants did not request that the Court address the motion at that time. Consequently, the Court concludes that the motion should be denied.

In view of the foregoing, it is hereby

ORDERED that defendants' joint motion for judgment of acquittal or a new trial is denied.

Date: July 11, 1991 JOHN GARRETT PENN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Filed July 15, 1991

UNITED STATES OF AMERICA

V Criminal No. 90-27

DAVID M. DALE, et al

ORDER

This case comes before the Court on defendants' Joint Motion for Judgment for Acquittal and Arrest of Judgment. Defendants move for judgment of acquittal under Rule 29 or for arrest of judgment under Rule 34 as to Court 1 on several grounds. First, defendants argue that the indictment is defective in its failure to meet the requirements for pleading a cover-up conspiracy established in Grunewald v. United States, 353 U.S. 391, 77 S.Ct. 963 (1957). Second, defendants contend that the government's theory of the conspiracy at trial was fatally at variance with the alleged conspiracy set forth in the indictment. Finally, defendants argue that the proof at trial was insufficient to establish a cover-up conspiracy under the Grunewald standard.

After a careful consideration of the motion, the opposition thereto, and the entire record in this case, the Court concludes for the reasons set forth in a Memorandum to be filed that the motion should be denied.

Accordingly, it is hereby

ORDERED that defendants' joint motion for judgment of acquittal and arrest of judgment is denied.

Date: July 12, 1991 JOHN GARRETT PENN
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 91-3228 **September Term, 1992**
CR 90-0027

United States of America

v.

David M. Dale,

Appellant

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and Consolidated Cases No. 91-3229, 91-3230,
91-3231 and 91-3232

BEFORE: Wald, Ruth B. Ginsburg and Henderson, Circuit Judges

ORDER

Upon consideration of the petitions for rehearing of Michelle L. Ashton, David M. Dale, Terence A. Sweeney and Automated Data Management, Inc., it is

ORDERED, by the Court, that the petitions are denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK
BY:
Robert A. Bonner
Deputy Clerk

TEXTS OF CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

United States Constitution:

1Article I, §9, cl. [3]. No Bill of Attainder or ex post facto Law shall be passed.

Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V:

No person shall be held to answer for a capital , or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .

Title 18, United States Code:

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $ 10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misde[illegible]or only, the punishment for such conspiracy shall not exceed the [illegible]aximum punishment provided for such misdemeanor.

§ 1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $ 10,000 or imprisoned not more than five years, or both.

§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $ 1,000 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $ 1,000,000 or imprisoned not more than 30 years, or both.

Title 26, United States Code (Internal Revenue Code):

§ 7201. Attempt to evade or defeat tax.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in

addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $ 100,000 ($ 500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

§ 7203. Willful failure to file return, supply information, or pay tax.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $ 25,000 ($ 100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution. In the case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is no addition to tax under section 6654 or 6655 with respect to such failure. In the case of a willful violation of any provision of section 6050I, the first sentence of this section shall be applied by substituting "felony" for "misdemeanor" and "5 years" for "1 year".

§ 7206. Fraud and false statements.

Any person who --

(1) Declaration under penalties of perjury. Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) Aid or assistance. Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; or

(3) Fraudulent bonds, permits, and entries. Simulates or falsely or fraudulently executes or signs any bond, permit, entry, or other document required by the provisions of the internal revenue laws, or by any regulation made in pursuance thereof, or procures the same to be falsely or fraudulently executed, or advises, aids in, or connives at such execution thereof; or

(4) Removal or concealment with intent to defraud. Removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331, with intent to evade or defeat the assessment or collection of any tax imposed by this title; or

(5) Compromises and closing agreements. In connection with any compromise under section 7122, or offer of such compromise, or in connection with any closing agreement under section 7121, or offer to enter into any such agreement, willfully --

(A) Concealment of property. Conceals from any officer or employee of the United States any property belonging to the estate of a taxpayer or other person liable in respect of the tax, or

(B) Withholding, falsifying, and destroying records. Receives, withholds, destroys, mutilates, or falsifies any book, document, or record, or makes any false statement, relating to the estate or financial condition of the taxpayer or other person liable in respect of the tax;

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $ 100,000 ($ 500,000 in the case of a

corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

Federal Rules of Evidence:

Rule 104. Preliminary Questions

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.

(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 901. Requirement of Authentication or Identification

(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question

is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute or rule. Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.

United States Sentencing Guidelines:

§ 1B1.2. Applicable Guidelines

(a) Determine the offense guideline section in Chapter Two (Offense Conduct) most applicable to the offense of conviction (i.e., the offense conduct charged in the count of the indictment or information of which the defendant was convicted). Provided, however, in the case of a plea agreement (written or made orally on the record) containing a stipulation that specifically establishes a more serious offense than the offense of conviction, determine the offense guideline section Chapter Two most applicable to the stipulated offense.

(b) After determining the appropriate offense guideline section pursuant to subsection (a) of this section, determine the applicable guideline range in accordance with § 1B1.3 (Relevant Conduct).

(c) A plea agreement (written or made orally on the record) containing a stipulation that specifically establishes the commission of additional offense(s) shall be treated as if the defendant had been convicted of additional count(s) charging those offense(s).

(d) A conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit.

Commentary

Application Notes:

* * *

5. Particular care must be taken in applying subsection (d) because there are cases in which the jury's verdict does not establish which offense(s) was the object of the conspiracy. In such cases, subsection (d) should only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense. Note, however, if the object offenses specified in the conspiracy count would be grouped together under § 3D1.2(d) (e.g., a conspiracy to steal three government checks) it is not necessary to engage in the foregoing analysis, because § 1B1.3(a)(2) governs consideration of the defendant's conduct.

* * *

Amendment No. 75 to § 1B1.2 (effective November 1, 1989):

* * *

Additional commentary (Application Note 5) is provided to address cases in which the jury's verdict does not specify how many or which offenses were the object of the conspiracy of which the defendant was convicted. . . . In order to maintain consistency with other §1B1.2(a) determinations, this decision should be governed by the reasonable doubt standard. A higher standard of proof should govern the creation of what is, in effect, a new count of conviction for the purposes of Chapter Three, Part D (Multiple Counts). Because the guidelines do not explicitly establish standards of proof,

the proposed new application note calls upon the court to determine which offense(s) was the object of the conspiracy as if it were "sitting as a trier of fact." The foregoing determination is not required, however, in the case of offenses that are grouped together under §3D1.2(d)(e.g., fraud and theft) because §1B1.3(a)(2) governs consideration of the defendant's conduct.

§ 1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)

The conduct that is relevant to determining the applicable guideline range includes that set forth below.

(a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) Solely with respect to offenses of a character for which @ 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) All harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(4) Any other information specified in the applicable guideline.

(b) Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence). Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

§ 2T1.1. Tax Evasion

(a) Base Offense Level: Level from § 2T4.1 (Tax Table) corresponding to the tax loss.

For purposes of this guideline, the "tax loss" is the greater of: (A) The total amount of tax that the taxpayer evaded or attempted to evade; and (B) the "tax loss" defined in § 2T1.3.

(b) Specific Offense Characteristics.

(1) If the defendant failed to report or to correctly identify the source of income exceeding $ 10,000 in any year from criminal activity, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(2) If sophisticated means were used to impede discovery of the nature or extent of the offense, increase by 2 levels.

§ 2T1.9. Conspiracy To Impair, Impede or Defeat Tax

(a) Base Offense Level (Apply the greater):

(1) Offense level determined from § 2T1.1 or § 2T1.3, as applicable; or

(2) 10.

(b) Specific Offense Characteristics. If more than one applies, use the greater:

(1) If the offense involved the planned or threatened use of violence, increase by 4 levels.

(2) If the conduct was intended to encourage persons other than or in addition to co-conspirators to violate the internal revenue laws or impede or impair the Internal Revenue Service in the assessment and collection of revenue, increase by 2 levels.

§ 2X1.1. Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Guideline)

(a) Base Offense Level: The base offense level from the guideline for the substantive offense, plus any adjustments from such guideline for any intended offense conduct that can be established with reasonable certainty.

(b) Specific Offense Characteristics

(1) If an attempt, decrease by 3 levels, unless the defendant completed all the acts the defendant believed necessary for successful completion of the substantive offense or the circumstances demonstrate that the defendant was about to complete all such acts but for apprehension or interruption by some similar event beyond the defendant's control.

(2) If a conspiracy, decrease by 3 levels, unless the defendant or a coconspirator completed all the acts the conspirators believed necessary on their part for the successful completion of the substantive offense or the circumstances demonstrate that the conspirators were about to complete all such acts but for apprehension or interruption by some similar event beyond their control.

(3) (A) If a solicitation, decrease by 3 levels unless the person solicited to commit or aid the substantive offense completed all the acts he believed necessary for successful completion of the substantive offense or the circumstances demonstrate that the person was about to complete all such acts but for apprehension or interruption by some similar event beyond such person's control.

(B) If the statute treats solicitation of the substantive offense identically with the substantive offense, do not apply subdivision (A) above; i.e., the offense level for solicitation is the same as that for the substantive offense.

(c) Cross Reference

(1) When an attempt, solicitation, or conspiracy is expressly covered by another offense guideline section, apply that guideline section.

Supreme Court, U.S.
FILED
NOV 22 1993
THE CLERK

No. 93-412

In the Supreme Court of the United States

OCTOBER TERM, 1993

DAVID M. DALE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the search warrant in this case satisfied the particularity requirement of the Fourth Amendment.

2. Whether petitioner made a "substantial preliminary showing" under *Franks* v. *Delaware*, 438 U.S. 154 (1978), that material false statements were intentionally or recklessly included in a search warrant affidavit.

3. Whether the district court abused its discretion by admitting tape recordings without making an express finding that the tapes were trustworthy.

4. Whether a course of conduct that includes violations of the criminal provisions of the Internal Revenue Code can properly support convictions for conspiracy to defraud the United States in violation of 18 U.S.C. 371 and wire fraud in violation of 18 U.S.C. 1343.

5. Whether the district court erroneously defined the term "reasonable doubt" in its instructions to the jury.

6. Whether petitioner's sentence was inconsistent with the Sentencing Guidelines.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. a1-a70) is reported at 991 F.2d 819. The order of the court of appeals remanding the case for clarification (Pet. App. a71-a73) is unreported, as is the district court's memorandum order (Pet. App. a74-a75) transmitting two memorandum decisions (Pet. App. a76-a81, a82-a102) to the court of appeals. The district court's decision on petitioner's motion to dismiss (Pet. App. a103-a125) is reported at 782 F. Supp. 615.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1993. A petition for rehearing was denied on June 16, 1993. Pet. App. a161. The petition for a writ of

certiorari was filed on September 14, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, petitioner was convicted on one count of conspiracy to defraud the United States and to commit various offenses, in violation of 18 U.S.C. 371; one count of subscribing to a false corporate tax return, in violation of 26 U.S.C. 7206(1); one count of attempting to evade income taxes, in violation of 26 U.S.C. 7201; one count of wire fraud, in violation of 18 U.S.C. 1343; two counts of concealing material facts from the Department of Defense by trick, scheme, or artifice, in violation of 18 U.S.C. 1001; and one count of making false statements to the Department of Defense, in violation of 18 U.S.C. 1001. Pet. App. a14-a15. He was sentenced to 41 months' imprisonment, a $675,000 fine, and a two-year term of supervised release. *Id.* at a15-a16. The court of appeals affirmed the convictions, but remanded for resentencing on grounds not relevant to the questions presented by the petition. *Id.* at a70.

1. The evidence at trial showed that petitioner and Michelle Ashton were Executive Vice-President and President, respectively, of Automated Data Management, Inc. (ADM), a Washington, D.C., firm. Ashton owned 82% of ADM's stock and petitioner owned the remaining 18%. In early 1985, ADM secured a contract to sell computers to the United States Army. Later that year, ADM opened offices in Germany and Korea. Terence Sweeney was hired as Vice-President in charge of ADM's European operations and David Bowers was hired as his counterpart in charge of Asian operations. Martin

Segal subsequently became Chief Financial Officer of ADM. Pet. App. a4.[1]

In the summer of 1986, Bowers arranged for Nancy Edwards, a legal adviser to ADM's Korean office, to set up a Guam corporation that would be able to take advantage of business opportunities not available to ADM. Edwards incorporated Asia Management Systems, Inc., whose name was soon changed to ADM Asia. Ashton and Dale each owned 37.5% of that company, while Bowers owned 25%. Following instructions from petitioner, Bowers also arranged for Edwards to purchase four Hong Kong corporations: Capulus, Fossano, Swaffham, and Gemona. Ownership of Swaffham and Gemona subsequently was transferred to petitioner, Ashton, and Bowers in the same percentages as ADM Asia. Pet. App. a5.

In February, May, and September 1986, petitioner and Ashton received payments totaling $50,000 from ADM funds channeled through ADM's Korean office. They did not report those payments as income on their 1986 federal income tax returns. Pet. App. a5-a6.

In addition, ADM made several payments to related companies during 1986 and 1987, and falsely treated some of those payments as business deductions. First, in August 1986, ADM paid $200,000 to Arlington Associates, a firm that was owned in equal shares by petitioner and Ashton. Arlington Associates initially reported the payment as a loan from Guam National Bank. Petitioner later instructed Bowers to draft documents reflecting

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[1] ADM, Ashton, Sweeney, and Segal were tried with petitioner, and were found guilty of all charges against them. Pet. App. a14-a15. Their appeals from the judgments of conviction were consolidated with petitioner's appeal (*id.* at a1-a2, a14-a16), but they do not join in this petition. Ashton filed a separate petition for a writ of certiorari (No. 93-131), which was denied on October 4, 1993.

that the payment was a loan to Arlington from Asia Management Systems (*i.e.*, ADM Asia). Pet. App. a6.

Second, in late 1986, ADM paid $417,532 to Swaffham and Gemona for marketing and product studies and other consulting work that was never actually performed. ADM recorded those payments as deductible business expenses. Third, in March 1987, petitioner and Bowers created a phony debt of $500,000 to Swaffham. The $500,000 "debt" was for software development purportedly performed by Swaffham but actually performed by ADM's Korean office at a cost of only $30,000. The "debt" was deducted as a business expense on ADM's 1986 tax return. Pet. App. a6-a7.

Meanwhile, Terence Sweeney, the Vice-President in charge of ADM's European operations, hired Larry Knight as a consultant. Sweeney and Knight subsequently formed a German corporation, ADM Hard- und Software Handelgesellschaft GmbH in Deutschland (ADM H&S) to take advantage of non-Army business opportunities in Germany. Petitioner and Ashton each owned 37.5% of ADM H&S, Sweeney owned 25%, and Knight was appointed general manager. Pet. App. a7-a8.

In December 1986, ADM wire-transferred $316,000 to Bourbonia Invest AG (Bourbonia), a Swiss investment firm operated by a friend of Knight's. In January 1988, ADM made a second payment to Bourbonia, in the amount of $102,655. Those payments were purportedly for consulting work performed by Bourbonia for ADM, but they in fact accrued to the benefit of petitioner, Ashton, ADM, and ADM H&S. The payments were treated by ADM as business deductions. Pet. App. a8-a9.

In early 1987, petitioner filed three forms with the Department of Defense in order to obtain a security clearance for ADM. Petitioner first completed a "Personnel Security Questionnaire," which asked him to disclose all

of his overseas business connections. In responding to that question, petitioner made no mention of the Hong Kong corporations, Swaffham and Gemona, although he had acquired a 37.5% interest in each of those two companies by November 1986. Petitioner also signed a "Statement of Full Disclosure of All Foreign Connections" in which he purported to "explain and fully disclose [his] foreign connections"; on that form, he disclosed only his 37.5% interest in ADM H&S. Pet. App. a9-a10. In addition, petitioner signed a form entitled "Certificate Pertaining to Foreign Interests," which indicated that ADM did not have interlocking directors with any foreign interests. *Ibid.*

In March 1987, after becoming concerned about his future with ADM and about potential criminal liability, Bowers began to tape record conversations with petitioner and Ashton. He also withdrew funds from Gemona's and Swaffham's bank accounts that he claimed represented his interest in the two corporations. Bowers testified that those actions represented his efforts to protect himself. Pet. App. a10-a11 & n.13.

On August 14, 1987, Bowers transmitted a resignation letter by facsimile to Ashton. In response, Ashton and Segal flew to Korea in an attempt to persuade Bowers to turn over all business records, including all tape recordings of telephone conversations, and to surrender his interests in ADM Asia, Gemona, and Swaffham. When Bowers refused, ADM and its principals took steps to alter the tax treatment of many of the transactions outlined above. Pet. App. a11.

First, in late August or early September 1987, Segal notified ADM's outside accountants that ADM's records had to be changed because the $417,532 paid to Gemona and Swaffham in December 1986 was not deductible. Segal also told the accountants that there was additional

revenue that had not been recorded. ADM's 1986 corporate tax return reflecting that information was timely filed on September 15, 1987. Pet. App. a11-a12.

Second, on November 30, 1987, petitioner and Ashton met with their personal accountant and told him that they had received taxable income that had not been included on their 1986 individual tax returns. Ashton subsequently filed an amended 1986 return adding taxable income of $40,000, which she characterized as previously unreported travel advances. Petitioner later added $10,000 to the taxable income reported on his 1987 return. Pet. App. a12.

Third, apparently in late August 1987, petitioner and Ashton signed a promissory note promising to repay ADM the $200,000 that ADM had paid to Arlington Associates in August 1986. That payment to Arlington Associates had initially been recorded as a loan from Guam National Bank and was later characterized by petitioner as a loan from Asia Management Systems. Pet. App. a12.

Fourth, during the summer of 1988, after federal agents searched ADM's headquarters, Segal informed one of ADM's accountants that ADM had mistakenly paid $316,000 in consulting fees on behalf of ADM H&S. Accordingly, the accountant prepared an amended return eliminating the deduction that ADM had previously taken for the December 1986 payment to Bourbonia. Segal drafted a memorandum to the accountant explaining that both the $316,000 payment and the subsequent $102,655 payment to Bourbonia were made in error. He also said that petitioner and Aston would repay ADM for the amounts paid to Bourbonia. Shortly thereafter, four promissory notes were prepared to divide the indebtedness between petitioner and Ashton according to their respective ownership interests in ADM. Pet. App. a13.

Finally, Segal told one of ADM's accountants in March 1989 that he had discovered that a $500,000 item formerly treated as a business deduction for software development had never been paid and should have been reversed. The accountant subsequently prepared an amended return deleting the $500,000 deduction. Pet. App. a13.

2. Prior to trial, petitioner filed a motion to suppress evidence seized during a search of ADM's offices in Washington, D.C., arguing that the warrant authorizing the search was unduly general. The warrant was based on an extensive affidavit of Heide K. Shintani, a special agent of the Defense Criminal Investigative Services, setting out alleged criminal violations of a variety of federal fraud statutes arising out of ADM's alleged substitution of less costly disk drives in lieu of the disk drives called for by the terms of ADM's contract with the Army. Pet. App. a83-a84.

The warrant sought "records and documents as further described in Attachment B." Pet. App. a44. Attachment B set forth numerous categories of business records believed to contain "specific information regarding the false statements and claims made by ADM." *Ibid.*[2] Each category of records set forth in the

[2] Those records included: claims for payment from the government; Department of Defense Forms 250; Army purchase orders and ADM shipping documents; invoices showing deliveries from several named suppliers; records of payments to the same named suppliers; receipts of payments from the Army; receipts of rebates from vendors; records reflecting installation of specified hard disks; production of assembly records; overseas bank account records; correspondence and memoranda between ADM and the same named suppliers; internal documents pertaining to the substitution of the hard disks; directions prepared for assembly technicians; and financial documents submitted to the Army or the Small Business Administration. Pet. App. a85 n.3.

Attachment was separated by a semi-colon; at the end of the list, following a comma, was the phrase "and other records which relate to the criminal scheme outlined in the above affidavit" of Agent Shintani. *Id.* at a44, a85 n.3. The time period of the records to be seized was limited to "June 1, 1984 through the present." *Id.* at a44. The warrant was executed on June 16, 1988, by Special Agent Shintani and approximately 14 other law enforcement officers. *Id.* at a84-a85.

The district court denied the motion to suppress. The court found that the warrant was not overly broad for two reasons: first, the warrant identified specific and limited categories of records to be seized; and second, the warrant limited the search to documents related to the criminal scheme outlined in the underlying affidavit. Pet. App. a44, a99-a101.

3. The court of appeals affirmed petitioner's convictions. Pet. App. a1-a70. The court rejected petitioner's claim that the tape recordings made by Bowers should not have been admitted because the district court failed to make an explicit threshold determination that they were trustworthy. *Id.* at a36-a38. Noting that admission of tape recordings is within the discretion of the district court "so long as the tapes are authentic, accurate and trustworthy," the court of appeals held that an express statement by the lower court that the tapes were reliable was not essential in this case "because the record indicates that the court accepted the government's proffer of trustworthiness and rejected [petitioner's] concerns." *Id.* at a36. In reaching that conclusion, the court of appeals relied on the fact that the tapes were admitted only after the government had presented extensive testimony concerning the creation and handling of the tapes. *Id.* at a37.

The court also rejected petitioner's argument that the trial court erred in refusing to hold an evidentiary hearing under *Franks* v. *Delaware*, 438 U.S. 154 (1978), to investigate whether Agent Shintani had intentionally or recklessly made false statements in her affidavit supporting the warrant to search ADM's offices and warehouse. Pet. App. a38-a43. The court held that Agent Shintani's failure to contact any Army officials in order to verify the allegations made by former ADM employees did not evidence reckless disregard for the truth, because an investigating officer need not "exhaust every possible lead, interview all potential witnesses, and accumulate overwhelming corroborative evidence" in order to demonstrate probable cause. *Id.* at a40. Moreover, the court noted that the agent's "failure to contact Army officials may have been entirely prudent given the possibility of a leak back to ADM." *Ibid.* Accordingly, the court concluded that "the district court correctly refused to hold a *Franks* hearing because [petitioner] failed to make a substantial preliminary showing that the government had knowingly, intentionally or recklessly disregarded the truth." *Id.* at a43.

The court next addressed petitioner's contentions that the warrant was overly broad and that the warrant's incorporation of Agent Shintani's affidavit was not a sufficient limitation on the government's search. Pet. App. a43-a49. The court rejected the district court's finding that the warrant was sufficiently particular on its face to satisfy the Fourth Amendment. In the court of appeals' view, "[t]he warrant's explicit authorization to the agents to seize 'business records including, but not limited to' those specifically identified subjected essentially all of ADM's records dated after June 1, 1984 to seizure" and rendered the warrant unduly general on its face. *Id.* at a44.

The court held, however, that Agent Shintani's affidavit sufficiently narrowed the scope of the warrant so as to satisfy the particularity requirement. Pet. App. a45-a48. The court explained that a search warrant may be construed with reference to a supporting affidavit if the affidavit is incorporated in, and accompanies, the warrant. *Id.* at a45. The court then upheld the district court's finding that the warrant incorporated the Shintani affidavit. *Id.* at a45-a47 & n.49.

In addition, although noting that the record was not clear as to whether the affidavit had actually accompanied the warrant, the court of appeals found that the allegations in the affidavit were in fact used to limit the scope of the warrant. Pet. App. a47-a48. The court explained that "Agent Shintani, who prepared the affidavit and obtained the warrant, was present at the search, oversaw the warrant's execution and guided the participating agents in seizing documents to conform the search to her understanding of the warrant's requirements." *Id.* at a48. Those precautions, the court held, "sufficiently limited the discretion of the executing agents." *Ibid.* Accordingly, the court concluded that the warrant in this case was sufficiently particular "because it identified several specific categories of documents to be seized, incorporated an affidavit to limit the search and was executed by the affiant pursuant to a specific plan." *Ibid.*

The court of appeals also found unpersuasive petitioner's argument that the district court's definition of reasonable doubt impermissibly lowered the government's burden of proof. Pet. App. a57-a58. Petitioner contended that the court's instructions improperly implied that a juror must be able to articulate a reason for his or her decision to find a defendant not guilty and impermissibly conveyed the impression that a high degree

of indecision is needed in order to justify a verdict of not guilty. After examining the challenged instruction, the court of appeals concluded that "[t]he instruction in its entirety fairly conveyed that the requisite doubt must be 'based on reason' as distinguished from fancy, whim or conjecture," and that "'in the context of the instructions as a whole and the trial record,' there is no 'reasonable likelihood that the jury . . . applied the challenged instruction in a way that violates the Constitution.'" *Id.* at a58, quoting *Estelle* v. *McGuire*, 112 S. Ct. 475, 482 (1991).

ARGUMENT

1. a. Petitioner contends (Pet. 11-14) that the court of appeals erred in holding that the search warrant at issue in this case satisfied the Fourth Amendment's particularity requirement. According to petitioner, an otherwise overbroad warrant cannot be cured by incorporation of a supporting affidavit where the record does not conclusively establish that the affidavit was present at the search. That claim does not warrant further review.

In order to prevent government officials from engaging in "a general, exploratory rummaging in a person's belongings," the Fourth Amendment requires that search warrants contain "a 'particular description' of the things to be seized." *Coolidge* v. *New Hampshire*, 403 U.S. 443, 467 (1971). That particularity requirement "makes general searches * * * impossible and prevents the seizure of one thing under a warrant describing another." *Stanford* v. *Texas*, 379 U.S. 476, 485 (1965). The court of appeals correctly sustained the district court's finding that the warrant in this case was sufficiently particular.

Assuming *arguendo* that the warrant was overbroad without reference to Agent Shintani's affidavit, the war-

rant's incorporation of that affidavit clearly sufficed to limit and refine the scope of the warrant. There was no need for the affidavit physically to accompany the warrant because Agent Shintani, who prepared the affidavit and obtained the warrant, was present at the search and directed the executing agents. Pet. App. a48. There is no contention in this case that the agents ignored the limitations in the warrant and the accompanying affidavit in conducting the search (*id.* at a49), so there can be no doubt that the government confined the scope of its search within the proper parameters. Under those facts, the warrant must be deemed sufficiently particular to satisfy the requirements of the Fourth Amendment.

Petitioner asserts that the decision below conflicts with decisions of numerous courts of appeals holding that a supporting affidavit must actually "accompany" a warrant in order to cure any facial overbreadth in the warrant. Pet. 12-13 & nn.8-12.[3] In none of the cases cited by petitioner, however, did the court hold that a warrant that expressly incorporated the supporting affidavit nonetheless violated the particularity requirement. Thus, none of those cases addresses the question at issue in this case, namely, whether the facial overbreadth of a warrant that expressly incorporates its supporting affidavit may be cured by the affiant's presence at, and direction of, the search conducted pursuant to the warrant. Accordingly, this case does not implicate a square conflict among the circuits.

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[3] See *United States* v. *Falon*, 959 F.2d 1143 (1st Cir. 1992); *Application of Lafayette Academy, Inc.*, 610 F.2d 1 (1st Cir. 1979); *United States* v. *George*, 975 F.2d 72 (2d Cir. 1992); *United States* v. *Johnson*, 690 F.2d 60 (3d Cir. 1982), cert. denied, 459 U.S. 1214 (1983); *Center Art Galleries-Hawaii, Inc.* v. *United States*, 875 F.2d 747 (9th Cir. 1989); *United States* v. *Leary*, 846 F.2d 592 (10th Cir. 1988).

b. In any event, the issue raised by petitioner does not warrant this Court's attention under the circumstances of this case. Even if the court of appeals erred in upholding the validity of the warrant, Agent Shintani plainly acted in good faith in obtaining and executing that warrant, and the evidence at issue was therefore admissible by virtue of the good-faith exception to the exclusionary rule identified in *United States* v. *Leon*, 468 U.S. 897 (1984), and *Massachusetts* v. *Sheppard*, 468 U.S. 981 (1984).

In *Leon*, this Court held that the exclusionary rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." 468 U.S. at 919. That is particularly true, the Court noted, "when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope." *Id.* at 920. The Court reasoned that, in such circumstances, the deterrent value of the exclusionary rule is vitiated by the fact that an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the search warrant is technically sufficient. *Id.* at 921.

In *Sheppard*, the Court applied the good faith exception to a search warrant that insufficiently described the items to be seized. There, the trial judge had suppressed evidence seized during the execution of a search warrant that incorrectly identified the items to be seized as evidence of a narcotics transaction, rather than a murder. Relying on *Leon*, this Court reversed, emphasizing that the officers had demonstrated their good faith by submitting an affidavit to a judge and thereafter relying on the judge's determination that the warrant he issued was sufficiently particularized. 468 U.S. at 989-991.

The same considerations that prompted this Court to apply the good-faith exception in *Leon* and *Sheppard* are

also present here. Agent Shintani "took every step that could reasonably be expected of [her]." *Sheppard*, 468 U.S. at 989. She prepared an extensive affidavit that detailed a pervasive fraudulent scheme. She presented that affidavit to a magistrate, who found probable cause to justify the searches and approved the description of the property to be seized. Moreover, as the court of appeals noted, this case involved a complex scheme to defraud, making it difficult to list with any greater particularity the books and records to be seized. Pet. App. a48; see *Andresen* v. *Maryland*, 427 U.S. 463, 480 n.10 (1976).

In addition, the fact that the affiant "was present at the search, oversaw the warrant's execution and guided the participating agents in seizing documents to conform the search to her understanding of the warrant's requirements" (Pet. App. a48) provided additional evidence of good faith. See *United States* v. *Luk*, 859 F.2d 667, 677 (9th Cir. 1988); *United States* v. *Wuagneux*, 683 F.2d 1343, 1351 n.6 (11th Cir. 1982), cert. denied, 464 U.S. 814 (1983). Finally, Agent Shintani and the other executing agents demonstrated their good faith by confining the scope of their search to the parameters of the warrant. See *United States* v. *Luk*, 859 F.2d at 677-678.

Petitioner contends (Pet. 13-14) that the courts of appeals are divided over the question whether the good-faith exception adopted in *Leon* is applicable "where the description of things to be seized is not sufficiently particular on the face of the warrant." It is clear from *Leon* itself, however, that insufficient particularity does not automatically preclude application of the good-faith exception. *Leon* held that suppression is appropriate when a search warrant is so facially deficient in failing to particularize the things to be seized that the executing officer could not reasonably presume that the warrant is valid. 468 U.S. at 923. But *Leon* did not hold that the

good-faith exception is inapplicable whenever a warrant is later found to be overbroad. Instead, whether the exception will apply "depend[s] on the circumstances of the particular case." *Ibid.*

In this case, the express incorporation by reference of the supporting affidavit into the warrant was alone sufficient to justify a belief on the part of the agents that the warrant gave them sufficient guidance as to what was to be seized. Thus, the good-faith exception would be applicable here even if the warrant were found to be unduly general.[4]

None of the cases on which petitioner relies (Pet. 14 n.18) holds that the good-faith exception is automatically inapplicable in all cases involving insufficiently particular warrants. To the contrary, in *United States* v. *Leary*, 846 F. 2d 592 (10th Cir. 1988), the court recognized that *Sheppard* "held that the [good-faith] exception could also be applied to warrants that violate the fourth amendment's particularity requirement." 846 F.2d at 607. The *Leary* court further indicated that even though it had declared the warrant at issue to be facially invalid, it still had to review the text of the warrant and the circumstances of the search to ascertain whether the agents in the case might have reasonably presumed the warrant to be valid. *Id.* at 607-609.

In *Center Art Galleries-Hawaii, Inc.* v. *United States*, 875 F.2d 747 (9th Cir. 1989), the court found that the affidavit was not expressly incorporated into the warrant and that the warrant therefore provided "for the almost unrestricted seizure of items which are 'evidence of vio-

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[4] Indeed, it would be curious to characterize the conduct of Agent Shintani and the other agents as reflecting bad faith where both lower courts found that the warrant was sufficiently particular.

lations of federal criminal law' without describing the specific crimes suspected." *Id.* at 750. In addition, the officer seeking the warrant was "aware of [the] overbreadth problem" but failed to bring that problem to the magistrate's attention or seek specific assurances that any possible defects would not invalidate the warrant. *Id.* at 753. Under those circumstances, the court concluded, the officer did not do "all that reasonably could be expected of him," and thus the good-faith exception was inapplicable. *Ibid.* *Center Art* did not hold that the good-faith exception may never be invoked in cases involving insufficiently particular warrants. Compare *United States* v. *Michaelian*, 803 F.2d 1042 (9th Cir. 1986) (applying good-faith exception to reject claim that warrant violated particularity requirement).

Finally, in *United States* v. *Decker*, 956 F.2d 773 (8th Cir. 1992), the judge who issued the warrant "acted as a rubber stamp," and the warrant "did not list the property to be seized." *Id.* at 777.[5] Moreover, "the officers seized hundreds of items unrelated to the search warrants." *Ibid.* Under those circumstances, the court of appeals concluded that "we cannot rule that the officers behaved in an objectively reasonable fashion." *Ibid.* In addition, the court held that the issuing judge's conduct in acting as a "rubber stamp" rendered the good-faith exception inapplicable, because "the *Leon* good faith exception does 'not apply in cases where the issuing magistrate wholly abandoned his judicial role.'" *Id.* at 778. The court did not purport to hold, however, that the good-faith

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[5] Unlike the warrant at issue in this case, the *Decker* warrant did not incorporate the supporting affidavit (956 F.2d at 776), and thus the warrant contained no meaningful limitation on the government's search.

exception is per se inapplicable in any case involving an insufficiently particular warrant.

2. Petitioner contends (Pet. 14-17) that the court of appeals erred in declining to order the district court to conduct a full evidentiary hearing under *Franks* v. *Delaware*, 438 U.S. 154 (1978). In *Franks*, the Court held that "where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request." 438 U.S. at 155-156.

Petitioner asserts (Pet. 14-15) that a *Franks* hearing was required because Agent Shintani failed to investigate the allegations set forth in her affidavit that ADM had illegally substituted products in executing contracts with the Army. Both courts below found, however, that Agent Shintani's failure to conduct such an investigation did not constitute intentional falsehood or reckless disregard for the truth within the meaning of *Franks*. Pet. App. a40, a94-a96. Thus, the courts below properly applied the legal standard set forth in *Franks*; those courts' fact-bound determination that petitioner failed to satisfy the applicable legal standard is not worthy of review.

In any event, as the courts below properly held (Pet. App. a40, a96), an affiant's failure to conduct a complete investigation before preparing an affidavit for a search warrant does not demonstrate reckless disregard for the truth. See *United States* v. *Miller*, 753 F.2d 1475, 1478 (9th Cir. 1985); *United States* v. *Mastroianni*, 749 F.2d 900, 909-910 (1st Cir. 1984). Indeed, as the court of appeals noted, Agent Shintani's failure to investigate the

substitution allegations "may have been entirely prudent given the possibility of a leak back to ADM." Pet. App. a40. The lower courts therefore correctly found that a *Franks* hearing was not required.

3. Petitioner next contends (Pet. 20) that the district court erred by not making an express preliminary determination under Federal Rule of Evidence 104 that certain tape recorded evidence admitted at trial was reliable and authentic.[6] The court of appeals correctly rejected that claim (Pet. App. a36-a38), and its ruling does not conflict with any decision of this Court or any other court of appeals. Petitioner's claim therefore does not warrant review by this Court.

The language of Rule 104 does not require a district court to make explicit findings of fact or to explain its rationale in detail when ruling on preliminary questions of admissibility. Instead, Rule 104 requires only that the court decide such questions under the appropriate legal standard. That requirement was satisfied in this case.[7]

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[6] Under Rule 104(a), "[p]reliminary questions concerning * * * the admissibility of evidence shall be determined by the court."

[7] The proper test for determining the admissibility of tape-recorded evidence is the one indicated by Fed. R. Evid. 901(a)—whether the evidence was sufficient to support a finding by the jury that the tape recordings are authentic. The standard set forth in Rule 901(a) requires only that the court conclude that the jury could find that the evidence is authentic. See 5 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 901(a)(01), at 901-17 to 901-19 & n.8 (1993). Because authentication questions under Rule 901(a) present issues of conditional relevance, Rule 901(a) rulings are governed oy the standard set forth in Rule 104(b). See Rule 901 advisory committee notes. Rule 104(b) provides that a court must admit conditionally relevant evidence if the jury could find the condition satisfied by a preponderance of the evidence. See *Huddleston* v. *United States*, 485 U.S. 681, 689-690 (1988).

The district court heard testimony on the admissibility of the tape recordings at issue before deciding whether to admit them. Pet. App. a37. In particular, the district court heard testimony in which a government witness identified the tapes and discussed the chain of custody and the electronic enhancement of the tapes. Gov't C.A. Br. 82-83. In addition, Bowers testified about his taping of the conversations, his taping practices, and the timing and circumstances of his delivery of the tapes to government agents, and he testified that the tapes constituted fair and accurate recordings of conversations to which he was a party. *Id.* at 83-84. The court also engaged in a lengthy discussion with counsel about the accuracy and reliability of the tapes, and petitioner declined an offer for additional testimony concerning the reliability of the tapes. Thereafter, the district court admitted the tapes into evidence. Pet. App. a37.

The court of appeals found that "the record indicates that the [district] court accepted the government's proffer of trustworthiness and rejected [petitioner's] concerns." Pet. App. a36. Moreover, the court of appeals concluded that the district court "implicitly found that 'the possibilities of misidentification and adulteration [were] eliminated, not absolutely, but as a matter of reasonable probability.'" *Id.* at a36-a37. The record plainly supports the court of appeals' determinations in that regard, and petitioner's claim to the contrary does not warrant review.[8]

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[8] Petitioner also asserts (Pet. 17-20) that this Court should grant review in this case in order to determine the proper standard for admissibility of tape-recorded evidence under the Federal Rules of Evidence. There is no need, however, for the Court to announce any special rule to govern the admissibility of such evidence. Tape recordings do not present any unique problems with regard to assessment of their authenticity, accuracy, or reliability.

4. Petitioner claims (Pet. 20-24) that the government should not be permitted to charge a defendant under general conspiracy (18 U.S.C. 371) and wire fraud (18 U.S.C. 1343) statutes when the underlying criminal conduct also violates the criminal tax statutes. That claim does not warrant further review.[9]

It is settled law that a conspiracy to impede and impair the functions of the IRS is punishable as a conspiracy to defraud the United States under 18 U.S.C. 371. See, *e.g.*, *United States* v. *Sturman*, 951 F.2d 1466, 1472-1474 (6th Cir. 1991); *United States* v. *Notch*, 939 F.2d 895, 901 (10th Cir. 1991); *United States* v. *Chesson*, 933 F.2d 298, 306-307 (5th Cir.), cert. denied, 112 S. Ct. 583 (1991); *United States* v. *Shermetaro*, 625 F.2d 104, 109-111 (6th Cir. 1980); *United States* v. *Turkish*, 623 F.2d 769, 771 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981). Similarly, the use of the mails or wires in furtherance of tax fraud constitutes mail or wire fraud under 18 U.S.C. 1341 or 1343. See, *e.g.*, Pet. App. a49-a50; *United States* v. *Condo*, 741

Moreover, petitioner fails to point to any conflict among the circuits regarding the proper standard for the admission of tape recordings, nor does he claim that the standard applied by the courts below is inconsistent with any decisions of this Court. Accordingly, there is no reason for the Court to consider the issue at this time.

[9] In the court of appeals, petitioner asserted only that his conviction for wire fraud in violation of 18 U.S.C. 1343 could not stand because "the criminal provisions of the Internal Revenue Code * * * are the exclusive means of prosecuting such alleged frauds." ADM C.A. Br. 25 (incorporated by reference, Pet. C.A. Br. 1). The court of appeals rejected that assertion. Pet. App. a49-a50. The broader arguments that petitioner seeks to raise in this Court were not pressed or passed upon below, and are therefore not properly presented for review by this Court. See, *e.g.*, *Zobrest* v. *Catalina Foothills School Dist.*, 113 S. Ct. 2462, 2466 (1993); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).

F.2d 238, 239 (9th Cir. 1984) (per curiam), cert. denied, 469 U.S. 1164 (1985); *United States* v. *Miller*, 545 F.2d 1204 (9th Cir. 1976), cert. denied, 430 U.S. 930 (1977).

United States v. *Minarik*, 875 F.2d 1186 (6th Cir. 1989), is not to the contrary. In that case, the Sixth Circuit held that defendants who had conspired to commit only the specific statutory offense of concealing assets in order to avoid a levy for unpaid taxes, in violation of 26 U.S.C. 7206(4), could not be convicted of conspiracy to defraud the United States under 18 U.S.C. 371, but should instead have been charged with conspiracy to violate Section 7206(4). 875 F.2d at 1190-1196. The court explained that its interpretation of the conspiracy statute was "the only way we can give full effect to the intention of Congress as expressed in § 7206(4)," *id.* at 1194, and that "where the duties of a citizen are as technical and difficult to discern as they are when a taxpayer, before levy, engages in otherwise legitimate activities that may make ultimate collection more difficult, * * * a Congressional statute closely defining those duties takes a conspiracy to avoid them out of the defraud clause and places it in the offense clause" of 18 U.S.C. 371. 875 F.2d at 1196.

The Sixth Circuit's rationale in *Minarik* is inapplicable in this case. Petitioners were not charged with a violation of 26 U.S.C. 7206(4), and the conspiracy alleged in the indictment was considerably broader than an agreement to violate one particular provision of the Internal Revenue Code. Petitioners used a variety of different methods to defraud the IRS, including the filing of false tax returns and the creation of shell corporations and false accounting records. As the Sixth Circuit itself has made clear, *Minarik* announced only "a limited rule to remedy the particular concerns raised by the facts of that case" and does not apply in cases where "the con-

spiracy implicated a variety of statutes." *United States* v. *Mohney*, 949 F.2d 899, 903, 905 (6th Cir. 1991); see *United States* v. *Sturman*, 951 F.2d 1466, 1473 & n.1 (6th Cir. 1991) (distinguishing *Minarik* because "[t]he conspiracy alleged and proven here was broader than a violation of a specific statute," and noting that other Sixth Circuit decisions "lend support to limiting *Minarik* to its facts"). Thus, whatever the validity of *Minarik* in the unique circumstances of that case, it has no application here. Cf. *United States* v. *Notch*, 939 F.2d at 901.[10]

5. Relying on *Cage* v. *Louisiana*, 498 U.S. 39 (1990), petitioner contends (Pet. 24-25) that the district court's instruction defining "reasonable doubt" was unconstitutional. As the court of appeals found (Pet. App. a57-a58), however, the instruction at issue in this case did not include the elements found impermissible in *Cage*. The *Cage* instruction "equated a reasonable doubt with a 'grave uncertainty' and an 'actual substantial doubt,' and stated that what was required [for conviction] was a 'moral certainty' that the defendant was guilty." 498 U.S. at 41. There was no similar language in the instruction at issue here, which provided:

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[10] Petitioner identifies as the seventh question presented (Pet. ii) whether the district court properly instructed the jury on conspiracy to defraud the United States and whether the court erred in refusing to define "deductible expense[s]" or instruct the jury that truth is a defense under 18 U.S.C. 1001. The petition contains no argument addressed to those contentions, however, which were considered and rejected by the court of appeals. Pet. App. a53-a57. Petitioner does not argue that the court of appeals' resolution of those issues was incorrect or that its decision conflicts with any decision of this Court or of any other court of appeals. Accordingly, there is no reason for this Court to review those questions.

> Reasonable doubt, as that name implies, is a doubt based on reason, it is a doubt for which you can give a reason. It is such a doubt as would cause a juror, after careful and candid and impartial consideration of all the evidence, to be so undecided that he cannot say that he has an abiding conviction of the defendant's guilt. It is such a doubt as would cause a reasonable person to hesitate or to pause in the graver or more important transactions of life. However, it is not a fanciful doubt, nor a whimsical doubt, nor a doubt based on conjecture. It is a doubt that is based on reason. The government is not required to establish guilt beyond all doubt or to a mathematical certainty or to a scientific certainty. The government's burden is to establish guilt beyond a reasonable doubt.[11]

Pet. App. a57 (emphasis omitted).

That instruction did not in any way "suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard." 498 U.S. at 41. As the court of appeals noted, the instruction properly "conveyed that the requisite doubt must be 'based on reason' as distinguished from fancy, whim or conjecture." Pet. App. a58. Thus, the court of appeals correctly rejected petitioner's argument that the instruction was unconstitutional, and in any event the court's application of the principles set forth in *Cage* to the particular instruction at issue in this case is not worthy of review.[12]

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[11] That instruction is substantially the same as standard jury instruction 2.09 of the Criminal Jury Instructions for the District of Columbia (3d ed. 1978). Pet. App. a57 n.53.

[12] There is no need to hold the petition in this case pending the Court's resolution of *Victor* v. *Nebraska*, No. 92-8894, and *Sandoval* v. *California*, No. 92-9049. In *Victor*, the petitioner challenges (92-8894 Pet. 33-39) an instruction that equated reasonable

6. Petitioner asserts (Pet. 25) that the district court failed to comply with Application Note 5 to Sentencing Guidelines § 1B1.2 in sentencing petitioner on the conspiracy count. According to petitioner, the district court failed to make the requisite finding beyond a reasonable doubt that petitioner was responsible for each object of the conspiracy. That contention does not merit further review.

Under Guidelines § 1B1.2(d), when a defendant is convicted "on a count charging a conspiracy to commit more than one offense," the sentencing range applicable to the conspiracy conviction is computed "as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit." Application Note 5 to that provision states in part:

> Particular care must be taken in applying subsection (d) because there are cases in which the jury's verdict does not establish which offense(s) was the object of the conspiracy. In such cases, subsection (d) should only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense.

The court of appeals concluded that "[t]he record * * * indicates that the district court did make the required determination of the object of the conspiracy." Pet. App. a61. The court observed that the district court expressly

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doubt with "substantial doubt." In *Sandoval*, the petitioner claims (92-9049 Pet. 8-11) that the inclusion of the phrases "moral certainty" and "moral evidence" rendered the reasonable doubt instruction constitutionally deficient. The instruction in this case contained none of the phrases at issue in *Sandoval* and *Victor*, and thus the disposition of those cases will not undermine the correctness of the court of appeals' decision here.

found that the relevant base offense level for petitioner's conspiracy conviction was that applicable to "conspiracy with an attempt to avoid taxes or tax evasion, rather than one based on false statements." *Ibid.* Moreover, the district court expressly adopted the findings of the presentence report that "[i]n this conspiracy, [petitioner] attempted to evade both personal and corporate taxes." *Ibid.* Finally, the court of appeals relied on the fact that the jury also convicted petitioner and his co-conspirator of attempting to evade taxes, thus demonstrating beyond a reasonable doubt that petitioner and his co-conspirator committed the underlying substantive offense. *Id.* at a61-a62. Under these circumstances, the court of appeals was correct in concluding that the district court made the requisite finding.

7. Finally, petitioner contends (Pet. 25-26) that the district court's application of the Guidelines to the conspiracy count of the indictment violated the Double Jeopardy Clause. Petitioner failed to raise that contention in the court of appeals, however, and that court did not address it. Accordingly, this Court should not consider the claim in the first instance. *Zobrest* v. *Catalina Foothills School Dist.*, 113 S. Ct. at 2466; *United States* v. *Lovasco*, 431 U.S. at 788 n.7.

In any event, petitioner's contention is without merit. The Double Jeopardy Clause does not forbid imposition of one sentence for conspiracy and a different sentence for the underlying substantive offense, because conspiracy and substantive crimes are separate and distinct offenses for double jeopardy purposes. See, *e.g.*, *United States* v. *Felix*, 112 S. Ct. 1377, 1384 (1992). Thus, there is no possible basis for challenging as violative of the Double Jeopardy Clause the district court's decision to sentence petitioner under pre-Guidelines law with respect to his pre-Guidelines conduct while at the same time sentenc-

ing petitioner under the Guidelines for his conspiracy conviction, which was based in part on post-Guidelines conduct.[13] Petitioner's claim to the contrary does not merit review.

Petitioner also appears to assert (Pet. 26) that application of the Guidelines to the conspiracy conviction violated the Ex Post Facto Clause because some of the conduct supporting the conspiracy conviction took place prior to the November 1, 1987, effective date of the Guidelines. Petitioner did not raise that claim in the court of appeals. In any event, it is well settled that the Ex Post Facto Clause is not implicated where an offense, though

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[13] *United States* v. *Niven*, 952 F.2d 289 (9th Cir. 1991), is not to the contrary. In that case, the defendant was convicted on multiple counts of mail and wire fraud, only some of which involved conduct occurring after the effective date of the Sentencing Guidelines. In determining the applicable Guidelines sentencing range, the district court took into account the entire loss suffered by the defendant's victims as a result of all of the defendant's substantive offenses, including those committed prior to the effective date of the Guidelines. *Id.* at 293. In order to avoid what it viewed as a potential violation of the Double Jeopardy Clause, the court of appeals construed the Guidelines to require the district court either to determine the Guidelines sentence based solely on post-Guidelines conduct or to impose concurrent sentences for the pre-Guidelines and post-Guidelines offenses. *Id.* at 293-294.

In this case, petitioner received concurrent sentences for the post-Guidelines conspiracy conviction and the pre-Guidelines substantive offenses. Thus, the sentence imposed is entirely consistent with *Niven*. In any event, *Niven* has no application in this case, because here, unlike in *Niven*, the district court did not base petitioner's Guidelines sentence on pre-Guidelines conduct that was not itself a part of the post-Guidelines crime. Petitioner's conspiracy conviction was based on both pre-Guidelines and post-Guidelines conduct, and petitioner cites no authority for the proposition that the Double Jeopardy Clause precludes imposition of a sentence for conspiracy based on the conduct giving rise to the conviction.

begun before the effective date of the challenged criminal statute, continues thereafter. See, *e.g.*, *United States* v. *Torres*, 901 F.2d 205, 226-227 (2d Cir.), cert. denied, 498 U.S. 906 (1990); *United States* v. *Kramer*, 955 F.2d 479, 485 (7th Cir.), cert. denied, 113 S. Ct. 595 (1992); *United States* v. *Giry*, 818 F.2d 120, 135 (1st Cir.), cert. denied, 484 U.S. 855 (1987); *United States* v. *Campanale*, 518 F.2d 352, 365 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976). Petitioner does not dispute that the conspiracy in this case continued after the effective date of the Guidelines.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1993

Supreme Court, U.S.
FILED
DEC - 6 1993
OFFICE OF THE CLERK

(3)

No. 93-412

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

DAVID M. DALE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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December 6, 1993

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

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DAVID M. DALE,

Petitioner,

v.

UNITED STATES OF AMERICA,

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

On November 23, 1993, the Solicitor General filed a very unusual brief in opposition to Petitioner David M. Dale's petition for certiorari in this case, which had been filed on September 14, 1993. The Government's lengthy brief in opposition not only contains unnecessary repetitions of the questions and the case,[1] but also devotes most of its discussion to arguing that the court of appeals' decision was correct on the merits. Those arguments largely are premature at this stage of the proceedings. When this Court grants review, the issues will be fully briefed and argued on the merits. At this stage, the Court is looking for guidance from the parties on the exercise of its discretionary jurisdiction, in accordance

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[1] The Government's brief consumes 11 pages in re-stating the case (Opp.1-11), but we are unable to detect any particular in which the Government's statement materially differs from the statement in the Petition (Pet.1-11). Furthermore, in no instance did we note even an allegation by the Government that the Petitioner has misstated any aspect of the record here.

with the Court's Rule 10. On this dimension, the Government's brief is deficient and in certain respects misleading as to the state of the record and of the authorities. Accordingly, we direct ourselves to those points in reply:

I. Fourth Amendment Issues

The Petition presents two questions under the Fourth Amendment: (1) whether an unconstitutionally general warrant can be cured by reference to an underlying affidavit that did not accompany the warrant at the search, merely because the affiant was present; and (2) whether the courts below correctly applied this Court's decision in *Franks v. Delaware*, 438 U.S. 154 (1978). The Government does not deny the importance of these questions, or the regularity with which they arise in the lower courts; nor does the Government argue that any prior decisions of this Court control the case here. Rather, the Government's principal arguments are: (1) that the particularity issue "does not implicate a square conflict among the circuits" (Opp.12); and (2) that the *Franks* issue does not warrant review because it is "fact-bound" (Opp.17).

In both instances, the Government's argument is demonstrably wrong, and the Court need not take the Petitioner's word for that fact. The courts of appeals themselves--including the decision below in this case--have recognized and commented upon the conflict over the circumstances in which an affidavit will be permitted to substitute for the Fourth Amendment's requirement of particularity in the warrant. The decision below also contradicts the Government's argument here on the *Franks* issue, by expressly framing its holding as a question of law--and therefore not "fact-bound"--in order to avoid yet another conflict among circuits on the applicable standard of review (*see* a39n.44).[2]

A. Lack of Particularity in the Warrant

The Government flatly misstates the record in this case in arguing that "[t]he court of appeals correctly sustained the district court's finding that the warrant in this case was sufficiently particular"

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[2] Citations to "a-" are to pages of the appendix to the Petition in this Court. Citations to "JA-" are to pages of the Joint Appendix in the court of appeals.

(Opp.11). As the record plainly shows, and the Government elsewhere acknowledges (*id.* 9), in fact the court of appeals specifically and explicitly reversed the district court's ruling on this point, and held "the warrant, by itself, was not sufficiently particular" (a44-45).[3] In addition to that misstatement, the Government's presentation on the particularity question is deficient both in its analysis of the question and in its treatment of the authorities.

The Government's presentation confuses three separate issues, all of which might be deemed included in the particularity question presented by the Petition, but each of which requires separate and distinct consideration: (1) whether the Fourth Amendment's particularity requirement can ever be satisfied outside of the warrant itself; (2) if so, under what circumstances; and (3) if the Fourth Amendment is violated, whether the exclusionary rule is applicable.[4]

1. The Warrant on its Face. This Court has never authoritatively approved even the basic idea that the Fourth Amendment's particularity requirement can be satisfied outside of the warrant itself, and the Government does not argue otherwise. This threshold issue alone would justify review in this Court, as it obviously presents an important issue of federal constitutional law that has not been, but should be, settled by this Court. Although there is no question that the weight of lower court authority favors this proposition, it is not monolithic, *see* 2 W. LaFave, *Search and Seizure* § 4.6(a) n.28 (2d ed. 1987). It is especially for this Court to decide the fundamental requirements of the Fourth Amendment, and this question deserves the Court's attention.

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[3] The Government may wish to argue that the court of appeals decision is in error on this point. If so, it should have cross-petitioned. As it stands, the Government's presentation is misleading.

[4] The Government's confusion here is not unique. A similar confusion was presented in the related context of particularity in specifying the place to be searched, and resolved by the court's analysis into these three issues, in *Gahagan v. United States*, 865 F.2d 1490 (6th Cir. 1989); *see also United States v. Maxwell*, 920 F.2d 1028 (D.C. Cir. 1990).

2. "Cure" by Reference to the Affidavit. As this Court has not decided the fundamental question, it also has not established any guidelines for the use of affidavits to "cure" a deficiency on the face of the warrant. Contrary to the Government's argument here, there is a deep and continuing conflict among the circuits over the conditions under which an affidavit will "cure" the warrant's description. Indeed, the courts of appeals would be very surprised by the Government's argument, as those courts themselves have recognized and commented upon the conflict among circuits. For example, in *Leary v. United States*, 846 F.2d 592 (10th Cir. 1988), the Tenth Circuit said that "[w]e do not follow the more relaxed rule discussed by the Eleventh Circuit in *United States v. Wuagneux*," *id.* at 603n.20. *Waugneux*, however, was cited and followed by the Eighth Circuit in *Rickert v. Sweeney*, 813 F.2d 907 (8th Cir. 1987), which enunciated the rule that "[a]n affidavit may provide the necessary particularity for a warrant if it is *either* incorporated into *or* attached to the warrant . . . [and] also . . . if the affidavit is merely present at the search." *Id.* at 909 (emphasis added). But the Ninth Circuit, citing *Leary* with approval, states the same requirement as that "the affidavit is attached to *and* incorporated by reference in the warrant." *Center Art Galleries-Hawaii, Inc. v. United States*, 875 F.2d 747, 750 (9th Cir. 1989); *see also United States v. Luk*, 859 F.2d 667, 676 & n.8 (9th Cir. 1988)(stating the same rule as "the law of our circuit" and commenting that "other circuits have applied these criteria less rigidly" (citing 5th, 8th, and 11th Circuit cases).

Prior to the decision below in this case, the D.C. Circuit also commented upon the conflict explicitly, in *United States v. Maxwell*, 920 F.2d 1028, 1032 & n.2 (D.C. Cir. 1990), placing itself in the strict attachment plus incorporation category rather than the "relaxed construction" attributed to the 6th and 11th Circuits. However, by its decision below here, the D.C. Circuit has shifted into the "relaxed" category (*see* a47 (citing and relying upon the Eighth Circuit's Rickert v. Sweeney decision)). The courts of appeals certainly believe that their different rules are in conflict.

That conflict is well-developed, nearly evenly divides the circuits, is based upon a difference of principle, and is important (see Pet.12-14). Review by this Court is justified on any of these grounds.

3. The *Leon* Exception to the Exclusionary Rule. The last of the three branches of the particularity question was not even reached by the decision below (*see* a43-49), and yet it forms the bulk of the Fourth Amendment discussion in the Government's brief in this Court (Opp.13-17). The Government's discussion largely is beside the point, not only as a premature address to the merits, but also as debating an argument--that the *Leon* exception is "automatically inapplicable" (Opp.15)--that Petitioner does not advance.

To the extent that the Government's argument is an invitation to use the *Leon* exception as a substitute for deciding the Fourth Amendment issues in this case, the argument should be rejected as unsound and inconsistent with this Court's responsibility to construe the Constitution. Before reaching the *Leon* exception, this or any other Court first must decide whether the Constitution otherwise has been violated.

If the *Leon* question is reached, then the Government's extended struggle with *Leon* in this context serves only to reinforce the case for review in this Court. As the Petition points out (*see* Pet.13-14), the lower courts themselves are grappling with the obvious incongruity of applying the Leon standard of objectively reasonable behavior in the context of the particularity requirement. Outside of an application like *Sheppard*, where the officers essentially were excused by their reliance on a magistrate's assurances, it is indeed difficult to conceive of a situation in which officers could behave reasonably while executing a facially defective warrant. This factor provides yet another reason favoring review here, in order to clarify the limitation of *Leon* to instances where the warrant is not "so facially defective" as to preclude reasonable reliance by the officers.

B. The *Franks* Hearing

The Government's argument that the lower courts' denial of a *Franks* hearing does not warrant review because it is "fact-bound" (Opp.17) again misstates the court of appeals' decision below, which was explicitly framed as a question of law in order to avoid another circuit conflict on the applicable standard of review (a39-40 & n.44). Under the actual posture of the case, it is the ideal vehicle for this Court's review, because it presents the most extreme, limiting case of the *Franks* principle: the unchallenged defense

showing is that any effort whatsoever by the investigating agent would have revealed the falsity of the allegations relied upon to show probable cause (*see* Pet.14-16); and yet the court of appeals held, as a matter of law, that there had been no substantial preliminary showing of reckless disregard for truth. If *Franks* does not require an evidentiary hearing here, then no such hearing is ever required on grounds of reckless, and this aspect of *Franks* should be reconsidered by this Court.

II. Admissibility of Sound Recordings

The Petition also presents two questions concerning the threshold standard of admissibility for sound recordings. (*See* Pet.i, 17-20). The Government's brief seeks to evade the first question by relegating its treatment to footnotes only (Opp.18n.7 & 19n.8), which is always a sure sign that the advocate has no effective response. On the second question, the Government argues essentially that this Court should not enforce its prior decisions under Fed. R. Evid. 104.

A. The Reliability Threshold

The Government's footnotes pretend not to understand the doctrinal difficulties (Opp.18n.7) and deny the special problems of reliability (Opp.19n.8) created by sound recordings under the Federal Rules of Evidence. In both respects, the Government is contradicted by the pertinent decisions of the courts of appeals.

As was pointed out by the Petition, the enactment of the Federal Rules of Evidence removed the prior doctrinal basis for assessing the threshold reliability of sound recordings. As a result, there is now an open question whether sound recordings are subject only to minimal authentication requirements under Fed. R. Evid. 901, or whether a more rigorous standard of reliability is required under that rule or otherwise. The existing case law in the courts of appeals reflects a division of authority on the rigor of the threshold showing required. According to the leading treatise on the Federal Rules of Evidence, the Third and Eighth Circuits continue to follow a rigorous list of foundational requirements first established prior to the Federal Rules, while the D.C., Second, Fifth, Ninth, Tenth, and Eleventh Circuits follow a "flexible" approach. J. Weinstein & M.

Berger, *Weinstein's Evidence*, ¶ 901(b)(5)[02], at pages 901-89 through 901-92 (1991). The courts of appeals' decisions themselves recognize and discuss the conflict. *See, e.g., United States v. Lance*, 853 F.2d 1177, 1181 (5th Cir. 1988)("we have expressly rejected [the 8th Circuit's] rigid test"); *United States v. King*, 587 F.2d 956, 960-61 (9th Cir. 1978)(discussing the differences between the 5th and 8th Circuit tests). Moreover, neither line of authority endorses the type of minimalist approach the Government advocates here.

The courts of appeals' decisions also contradict the Government's argument here that "[t]ape recordings do not present any unique problems with regard to assessment of their authenticity, accuracy, or reliability" (Opp.19n.8). In *King*, the Ninth Circuit recognized that "[m]ore so than photographs or other demonstrative evidence, sound recordings are susceptible to alterations that may be impossible to detect," 587 F.2d at 960; see also United States v. Sandoval, 709 F.2d 1553, 1554 (D.C. Cir. 1983)("tape recordings are peculiarly susceptible to undetectable adulteration and sometimes even indeliberate alteration," citing decisions of the 2d, 3d, and 5th Circuits).

Given the special nature of sound recordings, the ever-advancing technology of their creation, and their growing ubiquity in our everyday lives, the question of the question of the unsettled foundational requirements for their use as evidence in the federal courts is of sufficiently general importance to warrant this Court's review. The Government does not deny the general importance of the question, but again only argues the merits--prematurely, perfunctorily, and erroneously.

B. The Absence of a Preliminary Finding

The Government's brief does devote some text to the question present by the district court's failure to make a preliminary finding as required under Fed. R. Evid. 104, and the court of appeals' failure to correct that error (Opp.18-19). Here again, the Government seems to be arguing the merits summarily, with something approaching a "harmless error" analysis. But the pertinent consideration on certiorari is rather whether this Court needs to clarify or recast its prior decisions establishing that a

preliminary finding is required under the Rule for both conditional relevancy and other preliminary questions (*see* Pet.20). If this Court does not enforce its own decisions, they will not be followed. Nor is there any indication that the court of appeals rested its decision on a harmless error analysis. Rather, the court of appeals held that a non-finding was an "implicit" finding (a37-38), and that decision plainly is error which should be corrected, for otherwise the lower courts will have little incentive to follow the rules.

III. Federal Criminal Law Issues

The Government's brief in striking in its failure to suggest any pertinent reason militating against this Court's review of the federal criminal law issues presented by the Petition (*see* Pet.20-24). Thus, while the Government again seeks to preview the merits by arguing that the lower courts' doctrines are "settled law"(Opp.20)--in the lower courts--it does not cite any previous decisions of this Court that have approved any aspect of the huge edifice of unguided expansion of the general fraud and conspiracy statutes into the area of income tax offenses, where they may well be achieving nothing but mischief, both to individual freedoms and even to the efficient collection of revenues and enforcement of the tax laws (*see* Pet.24). The Government does not try to defend the oxymoron of a "conspiracy to attempt to evade"--one of the charged offenses here--or any of the policy implications of the case.

Instead, the Government's argument primarily is one of waiver--that certain aspects of these overarching points were waived in the court of appeals--which is not borne out by the record, and in any event is no bar to this court's review on certiorari. Aside from seeking to distinguish the Sixth Circuit's decision in *Minarik* (Opp.21-22), the Government's argument seems to be that this Court should not review the question whether 18 U.S.C. §371 should be permitted to override the distinctions of the Internal Revenue Code because this precise question was not argued in the court of appeals (*see* Opp.20n.9). However, the record shows that the question was fully preserved, first by defendant's motion to dismiss the indictment, which was the subject of a lengthy and reported opinion by the district court (a103-25), and that question was brought up by defendants' continued arguments against the

sufficiency of the conspiracy charge on appeal (*see* a50,53). Furthermore, in fact the court of appeals did decide the general question, in the course of discussing the defendants' arguments that "the Internal Revenue supplies the exclusive basis for tax fraud prosecutions" (a49) and that the multiple Internal Revenue Code counts merged together (a67-70), on which the court of appeals ruled in favor of the defendants, reversing the district court. In the latter instance, the court of appeals specifically ruled that "[t]he lesser included offense analysis . . . does not spill over to embrace prosecutions for Internal Revenue Code offenses plus offenses under other statutes" (a69n.61).

Thus, the questions are fairly presented here. They also are dramatically presented by the particular combination of charges made by the prosecutors in this case, which involves entirely an imaginary case of "tax evasion" in which no tax loss to the government was ever incurred or even threatened, and in which the charges were multiplied--and the ultimate punishment enhanced--entirely by acts of self-correction and tax *paying*, not "evasion." This bizarre inversion of rational tax law policy provides a unique opportunity for this Court to provide sensible guidance to both enforcement officials and the lower courts, by restoring a rational and effective structure of criminal tax liability rules that respects both the autonomy of the individual and the legitimate interests of the government.

IV. Remaining Issues

Limitations of time and space preclude us from providing a detailed reply to the Government's arguments concerning the reasonable doubt instruction and the sentencing issues (*see* Pet.24-26; Opp.22-27). However, two main points should be noted by the Court:

1. On the reasonable doubt question, the Court should take note that this is only one of several cases arising during the past few years concerning the application of the Court's per curiam opinion in *Cage v. Louisiana*, 498 U.S. 39 (1990). Although we believe that the instruction here plainly was deficient under *Cage*--and the Government, of course, argues the opposite--the regular recurrence of these issues suggests the need for this Court to render a fully

considered and detailed opinion on this obviously important subject.

2. On sentencing, one question simply concerns a straightforward application of Guidelines commentary (Pet.25), and the other more complex issues of multiple and retrospective punishment. The most general point rests simply on the observation that pre- and post-Guidelines sentences--even if imposed concurrently--are legally distinct and therefore multiple for Double Jeopardy purposes. To deny that point, as the Government apparently seeks to do, is to deny the basic intent of the Sentencing Reform Act of 1984.

Conclusion

For the reasons stated above and in the Petition, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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December 6, 1993